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

In the Matter of	)	
	)	
D F & W F	)	
	)	OAH No. 18-1245-PFD
2018 Permanent Fund Dividends	)	Agency No. 2018-029-0227

NOTICE TRANSMITTING FINAL DECISION

Attached is the administrative law judge's decision in this matter, which became the final agency decision on March 11, 2019 by operation of AS 44.64.060(f).

Judicial review of the 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 decision is mailed or otherwise distributed.

DATED: March 22, 2019.

By: *Signed*
Signature
Office of Administrative Hearings

I certify that on March 22, 2019, this document was sent to: D F & W F (by email); Peter Scott, PFD Division (by email).

By: *Signed*
Signature
Office of Administrative Hearings

DECISION

I. Introduction

D F and W F were found ineligible for the 2018 Permanent Fund Dividend (PFD) because the PFD Division determined they were out of state for too large a portion of the qualifying year and did not fall within the statutory provisions for allowable absences. After unsuccessfully pursuing an informal appeal, Mr. and Mrs. Fs appealed to this tribunal. Their case was heard on January 24, 2019.

The Fs are articulate advocates for the position that the absence rules are confusing and that the PFD Division's explanations of those rules are not as helpful as they could be. They also point out, correctly, that the distinctions made in the rules can be counterintuitive and can seem almost arbitrary in individual cases. Nonetheless, the denial is upheld because the law must be

applied as written, and the Fs do not fit within the absence rules as the Legislature has framed them.

II. Facts

D F and W F are longtime Alaskans who have received PFDs every year since the program began.[1] Now in their seventies and retired, they have taken to spending the winters "outside," traveling in their RV.[2] In general, they follow a snowbird pattern typical of many retired Alaskans.

This case turns on how the Fs spent 2017. There are no material facts in dispute, although one could quibble about the exact first or last day of one or two absence periods. Resolving any uncertainties in the light most favorable to the Fs, the year proceeded as follows.

The Fs began the year out of state, and traveled for pleasure in their RV from January 1 to March 26, with the single exception that Mr. F (only) took an eight-day trip back to Alaska in February. On March 26, they arrived in the Seattle area so that Mrs. F could receive medical treatment there, recommended by a physician, for a significant medical condition. This was part of a long-term, preplanned course of periodic out-of-state treatments.[3]

The first course of treatment took 12 days. On April 8, the couple returned to Alaska for the summer. They took a two-day trip to Seattle in July for another treatment, but otherwise stayed in the state until September 26. On that date they again returned to Seattle for more treatment. The treatment course lasted nine days; on October 5, the couple set off on their winter RV travels, which continued for the rest of 2017.[4]

In total, W F had 195 days outside Alaska in 2017, of which 23 were for medical treatment and 172 were for other activities. D F had 187 days outside Alaska, of which 23 were accompanying his spouse for her medical treatment and 164 were for other activities.

In 2018, the Fs looked at the PFD website regarding the handling of medical absences, and they apparently came away with the impression that the medical absence is limited to 45 days per year and that, in any event, medical absences can be added on to vacation absences of up to 180 days.[5] In January of 2019, W F called a PFD representative and asked about the

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1 Ex. 1, pp. 5, 10.
2 Testimony of Mr. F.
3 *Id.*; Ex. 2.
4 *See* Ex. 1, p. 3 and Ex. 2, p. 2. Doubts about the correct handling of travel and transition days have been resolved to maximize medical absence days and minimize vacation days. The result is the same regardless of how these doubts are resolved, however.
5 This is gleaned from multiple statements the Fs have made through the appeal process.

medical absence rules, and the answer she received did not mention a 45 day limitation associated with claiming that absence.[6]

III. Discussion

A. Resolution According to PFD Law

The qualifying year for the 2018 dividend was 2017.[7] In order to qualify for a PFD, the applicant must have been physically present in Alaska all through the qualifying year, or only have been absent for one of the 17 allowable reasons listed in a statutory section entitled "Allowable Absences," AS 43.23.008.[8] There are two of the allowable absences that potentially apply to Mr. and Mrs. F.

One of the specifically allowable absences is an absence for "any reason consistent" with Alaska residency. Vacations and the like fit under this absence. However, an absence for this open-ended reason cannot have exceeded 180 days under any circumstances.[9] Since both applicants were absent for more than 180 days, this allowable absence cannot, by itself, save their eligibility for the dividend.

The second allowable absence that might apply to Mrs. F is an absence "receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician." This provision is found in subsection (a)(5) of the statute. This absence does not have a maximum number of days. However, the medical allowable absence brings with it a limitation that prevents it from working for Mrs. F. A person who claims a medical absence *cannot* add onto it the full 180 days of the open-ended allowance discussed above. Instead, a person who claims the medical absence can have no more than 45 additional (non-medical) days of absence under the open-ended allowable absence. This is because Alaska Statute 43.23.008(a)(17)(C) limits the catchall "any reason consistent" absence to "45 days in addition to any absence or cumulative absence under (4) – (16) of this subsection."[10] Mrs. F had at least 172 non-medical days of absence.

The second allowable absence that might apply to D F is an absence "accompanying another eligible resident who is absent for a reason permitted under . . . (5) . . . of this subsection as the spouse . . . of the eligible resident." This provision is found in subsection (a)(13) of the

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6 Testimony of Ms. F. If her recollection is accurate—and it seems likely that it is—the answer she received was incomplete.

7 AS 43.23.095(6).

8 AS 43.23.005(a)(6).

9 AS 43.23.008(a)(17)(A).

statute. This absence likewise does not have a maximum number of days. However, the spousal absence likewise brings with it a limitation that prevents it from working for Mr. F. A person who claims the spousal absence in (a)(13) *cannot* add onto it the full 180 days of the open-ended allowance discussed at the beginning. Instead, a person who claims this absence can have no more than 45 additional days of absence under the open-ended allowable absence. This is, again, because Alaska Statute 43.23.008(a)(17)(C) limits the catchall "any reason consistent" absence to "45 days in addition to any absence or cumulative absence under (4) – (16) of this subsection," and subparagraph (13) falls within that span.[11] Mr. F had at least 164 non-medical days of absence.

Thus, regardless of how one works with the allowable absences, there is not a legal way to grant either Mr. or Mrs. F a dividend.

B. Estoppel

The only circumstance under which the law might not be applied as written in a case like this is by means of the doctrine of equitable estoppel. This is a principle of fundamental fairness that the Alaska Supreme Court has endorsed in situations where a citizen has reasonably acted in reliance on misinformation provided by the government. The doctrine might apply, for example, if a citizen tentatively planned a 190-day vacation but, before leaving, wrote the Director of the PFD Division asking if such a long absence would interfere with PFD eligibility. If the Director wrote back assuring the citizen that he or she could not lose eligibility based on such an absence, the Director—and the Division—might later be "estopped" (essentially, disqualified) from later contending otherwise in a legal proceeding.

To be able to use this doctrine, the Fs would have to prove each of the following elements:

> (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.[12]

In this case, however, the second element was clearly missing. The Fs did consult the PFD website, and they did call the PFD Division for advice, but they did so only after completing

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10 AS 43.23.008(a)(17)(C).

11 AS 43.23.008(a)(17)(C).

12 *Crum v. Stalnacker* , 936 P.2d 1254, 1256 (Alaska 1997) (applying estoppel against the government test in a Teachers' Retirement System case).

their 2017 absences. They cannot possibly have acted in reliance on the advice—mistaken or otherwise—because they got the advice after they had already acted.

C. Website Confusion

The PFD website attempts to translate the statutory language about allowable absences into understandable prose. This guidance effort is found at Exhibit 7, pages 10-12.

The Fs point to one sentence that seems especially confusing. Found under the header "Medical, Family Care, and Other Absences," it reads:

> If you are not a military member or student, and you are claiming an allowable absence of more than 180 days, you are limited to 45 additional days for any reason, regardless of the circumstances.

What this is intended to convey is the concept discussed in Part III-A above, which is that if a person's total time outside Alaska exceeds the 180-day limit of the catchall absence, and the person therefore need to use one of the specific absence categories such as the one for medical treatment, they will not be able have more than 45 days *outside* the scope of the specific absence category or categories. In other words, the 180-day catchall absence category shortens to 45 days for these people.

This is a very tricky concept, and the Fs are correct that it is not unambiguously conveyed in the single sentence quoted above from the website. The sentence would be consistent with several interpretations, including this one: that the 45-day limit on additional absences applies only if the medical absence is "more than 180 days." That interpretation, however, would be entirely wrong. The Fs were correct to point out this problematic sentence, so that the Division can consider modifying it or, more likely, trying to convey the concept in multiple sentences.

In fairness to the Division, the website also has an example scenario below the quoted sentence, and the example is correct.

IV. Conclusion

Because of their extended absences, D F and W Fare not eligible for the 2018 PFD. They remained Alaska residents, and nothing in this decision precludes them from eligibility for future PFDs.

DATED this 25th day of February, 2019.

By: *Signed*
Signature
Christopher Kennedy

Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]