

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

In the Matter of)	
)	
C. J.)	OAH No. 23-0059-PFD
)	Agency No. 2022-051-9184
_____)	

DECISION

I. Introduction

C. J. is a lifelong Alaskan who has been living outside the state for several years while serving in the military. Military servicepeople stationed outside the state can maintain Permanent Fund Dividend (“PFD”) eligibility if they return to Alaska for certain lengths of time with certain frequency. C. J. was scheduled to satisfy those requirements when the COVID-19 pandemic hit. He spent the next two years under strict quarantine and travel restrictions from the military. The Legislature passed SB 241 to make PFD eligibility allowances for people unable to return to Alaska in 2020. The Division interprets this law as applying only to 2021 PFD applications and therefore denied C. J.’s 2022 PFD. As discussed below, the Division’s interpretation of SB 241 is reasonable, but interpreting this law to apply to a 2022 PFD is more in keeping with the Legislature’s intent with this and other PFD statutes. Accordingly, the Division’s decision denying a 2022 PFD for C. J. is reversed.

II. Background

C. J. is a life-long Alaskan who has been living out of state since he enlisted in the U.S. Navy in 2016.¹ C. J. was stationed in City A from 2016 until July 2021 when he was transferred to Maryland.²

Generally, a person must physically reside in Alaska to be eligible for a PFD. But certain long-term absences are allowed, including for active military service.³ Military servicemembers must still meet an eligibility requirement of spending at least 72 consecutive hours in Alaska during the prior two years.⁴ In 2013, the legislature adopted an additional requirement that

¹ Ex. 1; Ex. 6 at 2; Ex. 10.
² C. J. testimony.
³ AS 43.23.008(a)(3).
⁴ AS 43.23.005(a)(4).

persons who have had an allowed absence from the state for five consecutive years must have spent at least 30 days in Alaska during that time to remain eligible for a PFD.⁵ For a 2022 PFD, the operative period for satisfying the 72-hour rule is 2020-2021, and the period for satisfying the 30-day rule is 2017-2021.

C. J. spent six days in Alaska in 2017 and 13 days in 2019, for a total of 19 days.⁶ C. J. scheduled leave from May 20, 2020 through June 6, 2020, intending to spend those 18 days in Alaska — an amount of time that would have easily satisfied both the 72-hour and 30-day rules for a 2022 PFD application.⁷

C. J. was at sea when the COVID-19 pandemic started. By the time he returned to City A on March 16, the situation in City A was so dire that his May-June leave was cancelled.⁸ His command further prohibited any travel outside a 100-mile radius, a restriction that remained in place through July 2021 when he was transferred to Maryland.⁹ C. J. was granted emergency leave to attend a funeral in Alaska in 2020, but it was limited to 48 hours and was difficult to secure, requiring authorization well up his chain of command.¹⁰ That emergency leave provided C. J. with 48 of the 72 hours needed to satisfy the 72-hour rule and 21 of the 30 days needed to satisfy the 30-day rule for a 2022 PFD.

When C. J. was transferred to Maryland in July 2021, the Navy’s COVID restrictions there allowed travel, but only within the Lower 48.¹¹ Thus C. J. was able to drive to Florida for military schooling in 2021, but was not permitted to fly to Alaska.¹²

The Division denied C. J.’s PFD application for 2022, finding that he did not satisfy the 72-hour or 30-day rules.¹³ He appealed, taking issue with the impact of these rules on Alaskans who serve in the military, but not with the Division’s factual findings.

A hearing was held on February 23, 2023.

III. Discussion

⁵ AS 43.23.008(d).

⁶ Ex. 2.

⁷ C. J. testimony.

⁸ *Id.*

⁹ *Id.*

¹⁰ C. J. testimony; Ex. 3 at 2.

¹¹ *Id.*; Ex. 11 (Department of Navy, Operational Commitment Letter stating that C. J. was prohibited from traveling outside the “continental United States” in 2021; C. J. clarified at the hearing that the restriction applied to the Lower 48).

¹² C. J. testimony.

¹³ Ex. 2, 4.

Because C. J. has been outside Alaska serving in the military for more than five years, he must satisfy both the 72-hour and 30-day rules to be eligible for a 2022 PFD.¹⁴ There is no question C. J. did not spend 72 hours in Alaska during 2020-2021 or 30 days in Alaska during 2017-2021. The question is whether the Division or the Commissioner have any flexibility to grant him a 2022 PFD given these facts.

The Commissioner has flexibility to waive the 72-hour rule for an applicant under military orders during a “time of national military emergency.”¹⁵ In prior years, the Commissioner has issued blanket waivers for applicants meeting certain requirements, such as receipt of imminent danger or hostile fire pay.¹⁶ No such blanket waiver was in place for the 2022 PFD, however. Regardless, the Commissioner always has authority to grant a waiver for an individual applicant, so long as the country is in a “time of national military emergency” and the applicant is a person or family member of a person “under military orders.”¹⁷ President George W. Bush declared a national emergency on September 14, 2001.¹⁸ That proclamation has never been lifted, and it has been expressly extended by Presidential orders in each year since 2001.¹⁹ It is apparently the national military emergency Commissioners have considered in making blanket waivers in certain years. Because there is a continuing national military emergency, the Commissioner has discretion to waive the 72-hour requirement for any applicant who was under military orders during the two years prior to the dividend year, as well as for that applicant’s family.

The Commissioner could have—and could still—apply the waiver provision to C. J. because he was under military orders in a time of national military emergency.

But even with a waiver, C. J. would need to separately satisfy the 30-day rule by spending 30 days in Alaska in 2017-2021. As discussed above, C. J. was in Alaska for 21 days, including the 48-hour emergency leave in 2020, but was otherwise prohibited by the military

¹⁴ AS 43.23.005(a)(4); AS 43.23.008(d).

¹⁵ AS 43.23.005(f).

¹⁶ See, e.g., National Emergency Military Absence Policy for the 2017 Permanent Fund Dividend (Jan. 18, 2017), available at https://pfd.alaska.gov/docs/permanentfunddividendlibraries/default-document-library/2017-signed-physical-presence-waiver-military.pdf?sfvrsn=41d49c8b_3.

¹⁷ AS 43.23.005(f)(1) (formerly AS 43.23.005(e)(1)).

¹⁸ Proclamation 7463 — Declaration of National Emergency by Reason of Certain Terrorist Attacks, September 14, 2001, available at <https://www.govinfo.gov/content/pkg/WCPD-2001-09-17/pdf/WCPD-2001-09-17-Pg1310.pdf>.

¹⁹ Most recently, see Notice of the President of the United States, 87 F.R. 55827 (Sept. 9, 2022); Notice of the President of the United States, 86 F.R. 50835 (Sept. 9, 2021); Notice of the President of the United States, 85 F.R. 56467 (Sept. 10, 2022); Notice of the President of the United States, 84 F.R. 48545 (Sept. 12, 2019).

from travelling to Alaska during 2020 or 2021 because of COVID. Unlike the 72-hour rule, the five-year rule has no waiver option. The rule has been strictly applied and severs Alaska residency, which cannot be restored while a person remains out of state.²⁰

The only potential allowance is in SB 241, a law the Alaska Legislature passed in late March 2020 to extend COVID relief under a number of state laws. The Governor signed the bill into law on May 18, 2020. For PFD eligibility, SB 241 amended the uncodified law to state:

Notwithstanding AS 43.23.005(a)(4) and 43.23.008(d), during the novel coronavirus disease (COVID-19) public health disaster emergency declared by the governor on March 11, 2020, as extended by sec. 2 of this Act [to November 15, 2020], an individual otherwise eligible for a permanent fund dividend who has notified the commissioner of revenue or the commissioner's designee that the individual expects to be absent from the state for a continuous period on or after March 11, 2020, remains eligible to receive a permanent fund dividend if the only reason the individual would be ineligible to receive a permanent fund dividend is that the individual was absent from the state because of conduct, including maintaining a voluntary or compulsory quarantine, related to avoiding or preventing the spread of COVID-19.²¹

SB 241 also contained, at Section 34, a broad delayed repealer provision that operated to terminate Section 16 and most other sections of the act “on . . . November 15, 2020.”²²

SB 241 was hastily assembled over a six-day period as the pandemic was closing in. Section 16 was added by floor amendment in the House at the end of the process, after the bill had already passed the Senate and just two days before final passage.²³ It remained in the final legislation that emerged from a House-Senate conference committee two days later.

Section 16 of SB 241 had three main effects. First, and most obviously, it made it possible for Alaskans who could not return to the state due to COVID-19 to be exempt from the usual 180-day limit on absences during 2020. For instance, a person who was wintering outside Alaska when the pandemic hit and was then unable to return for summer as planned because of

²⁰ *Jones v. State, Dep't of Revenue*, 441 P.3d 966, 974-75 (Alaska 2019) (when a person fails to meet the requirement to spend 30 days in Alaska over five years, residency is severed and must be re-established).

²¹ AK LEGIS 10 (2020), 2020 Alaska Laws Ch. 10 (S.B. 241). The Division has previously interpreted the requirement to notify the Department as satisfied through the application process. When SB 241 was enacted, the Department of Revenue envisioned a slight administrative burden whereby it would keep track of individuals who so “notified” the department in 2020. FCCS SB 241 – Fiscal Note 24 (Dept. of Revenue, March 28, 2020). It may be that no such notification and recordkeeping procedure was ever set up, or that the Division concluded that people’s prior dividend applications claiming extended absences fulfilled the requisite notification. In any event, the Division has not—in this case or in any other case before OAH—contended that the applicant fails to meet Section 16 on the basis of failure to meet the “has notified” requirement.

²² *Id.*

²³ House Journal, March 26, 2020, pp. 2112-2113.

quarantines could remain eligible in 2021 even though their absence exceeded 180 days and they did not have one of the traditional long-term allowances such as military service or college attendance. This was the effect noted in commentary on the new section as it was being added to the bill.²⁴

By providing for PFD eligibility “notwithstanding” the 72-hour and 30-day rules, Section 16 also allowed Alaskans who were on long-term allowable absences in 2020 to remain eligible for PFDs even though they were prevented from returning to Alaska in 2020 to satisfy the 72-hour rule or the 30-day rule. An absence *during 2020* could have no effect on 2020 eligibility in connection with the 72-hour or 30-day rules. Thus Section 16’s effects on the 72-hour and 30-day rules necessarily related to future dividends — that is, for 2021 and perhaps later dividends. Prior Department of Revenue appeal decisions have held that under SB 241 military servicemembers unable to return in 2020 to satisfy the 72-hour and 30-day rules can remain eligible for a 2021 PFD.²⁵

The question here is whether and how SB 241 also applies to a 2022 PFD application. In denying the 2022 PFD application for C. J., the Division took the position that Section 16 of SB 241 can have no effect at all on 2022 eligibility.

While the intent of the Legislature guides the construction of a statute, the starting point for interpreting a statute is its plain language. The Alaska Supreme Court has indicated, in the context of another case relating to the 30-day rule, that tribunals should apply “a sliding scale approach to statutory interpretation, in which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.”²⁶

The operative language of Section 16 is plain in most respects. “Notwithstanding”—that is, in spite of—the 72-hour rule and the 30-day rule, a person “remains eligible” if the “only reason” the individual would be made ineligible by one of these rules is a certain kind of past absence. That past absence must have been “conduct . . . related to avoiding or preventing the spread of COVID-19.” And, since Section 16 was only in effect from March 11 to November 15, 2020, that conduct has to have occurred during the specified seven-month window. It is

²⁴ FCCS SB 241 – Fiscal Note 24 (Dept. of Revenue, March 28, 2020); Senate Free Conf. Comm. on SB 241, March 28, 2020, remarks of Juli Lucky (committee aide).

²⁵ *In re K.Q.*, OAH 21-2396-PFD (Dep’t of Revenue 2021); *In re B.B.*, OAH No. 21-2174-PFD (Dep’t of Revenue 2022) (<https://aws.state.ak.us/OAH/Decision/Display?rec=6844>); *In re N.I.*, OAH No. 21-2153-PFD (Dep’t of Revenue 2022). The Department of Law concurred in the outcome of *In re N.I.*

²⁶ *Jones v. State, Dep’t of Revenue*, 441 P.3d 966, 973 (Alaska 2019) (quoting prior authority).

clear, therefore, that a person relying on Section 16 to retain eligibility must first show his or her absence during that window in 2020 was “related to avoiding or preventing the spread of COVID-19.” Second, the person must show that the absence was the “only reason” for failing to meet the time minimum of one or both of the two rules.

It is important to note that the first criterion would exclude many applicants. If a person was absent from the state from March to November 2020 but was absent for reasons other than COVID-19, SB 241 will not help that applicant to meet eligibility in any subsequent dividend year. C. J. certainly satisfies this requirement. He had plans to travel to Alaska from May 20, 2020 through June 6, 2020, but was prevented from doing so during any of 2020 by military quarantine and travel restriction orders specific to COVID.

The second criterion is more complicated to apply. The 2020 absence has to be the “only reason” C. J. failed to satisfy the 72-hour and 30-day rules. This was not an issue for him in 2021 because he had already satisfied the 72-hour rule for qualifying years 2019-2020 and he had not yet been absent from the state long enough for the 30-day rule to apply. The Division argued at the hearing that C. J. cannot avail himself of SB 241 for 2022 because he had no need to avail himself of this law for his 2021 PFD. That is not how statutes apply absent an express restriction and SB 241 includes no such language.

But consider the example of a person applying for a 2021 dividend who was absent for the entirety of both 2019 and 2020. The narrowest interpretation of Section 16 would be that even if the absence in 2020 was due to COVID-19 precautions, the person’s failure to meet the 72-hour rule is *also* due to the person’s absence in 2019 and thus the 2020 COVID-related absence was not the “only” reason for ineligibility under the rule. The trouble with applying Section 16 this way, however, is that there is no conceivable applicant whose 2021 (or later) eligibility would be saved from the 72-hour rule or the 30-day rule by SB 241. And therefore a phrase in the legislation—“[n]otwithstanding AS 43.23.005(a)(4) and 43.23.008(d)” —would be rendered superfluous. Statutes should be construed such that “effect is given to all words in the statute and none are rendered superfluous.”²⁷ For this reason, in the context of 2021 applicants the department has already rejected an interpretation of SB 241 that would apply “only reason”

²⁷ *In re Adoption of Missy M.*, 133 P.3d 645, 650 (Alaska 2006).

to mean that the 2020 absence cannot coexist with other reasons that explain the *other* time periods when the person did not return to Alaska.²⁸

The Division, in effect, proposes an application of the “only reason” criterion that would focus on whether the 2020 COVID-related absence was the *final*, independently sufficient reason for the person’s failure to meet the 72-hour or 30-day rule. In the Division’s application, SB 241 is only relevant to the 2021 dividend year. If 2020 was the final year for a person to satisfy the 72-hour or 30-day rules, and the person was short of reaching the required number of days as of March 11, 2020, a COVID-related failure to return in 2020 would not be disqualifying in 2021. But the person could never rely on SB 241 for 2022 eligibility because the person could potentially have rectified any shortage of days in 2020 by returning in 2021.

This is a plausible interpretation of what the Legislature might have had in mind, although there is no actual evidence of the Legislature’s intent on this point. But this interpretation has a problem: it effectively gives some applicants one less year to satisfy ongoing physical presence rules. The 72-hour and 30-day rules give applicants multiple years to satisfy both requirements. SB 241 acknowledges that COVID restrictions took one of those years away from many applicants by taking away the option to return to the state during much of 2020. Under the Division’s interpretation of SB 241, it is okay if a 2021 PFD applicant did not meet the 72-hour requirement in a single year (2019 of the 2019-2020 period) or 30-day requirement in four years (2016-2019 of the 2016-2020 period), but it is not okay if a 2022 PFD applicant did not meet the same 72-hour requirement in a different single year (2021 of the 2020-2021 period) or the same 30-day requirement in a different four years (2017-2019 and 2021 of the 2017-2021 period). In that respect, the Division’s interpretation is inconsistent with the Legislature providing a set number of multiple, continuous years to satisfy these requirements—two years for the 72 hours, and five for the 30 days.

Considering those multi-year periods, a second interpretation of SB 241 would be to remove 2020 from consideration, such that the two-year lookback and five-year lookback can only be applied if they do not encompass 2020. One approach would be that for applicants meeting the first criterion of Section 16, the 72-hour rule could only be applied starting in 2023,

²⁸ *In re K.Q.*, OAH 21-2396-PFD (Dep’t of Revenue 2021); *In re B.B.*, OAH No. 21-2174-PFD (Dep’t of Revenue 2022) (<https://aws.state.ak.us/OAH/Decision/Display?rec=6844>); *In re N.I.*, OAH No. 21-2153-PFD (Dep’t of Revenue 2022). The Department of Law expressly concurred in reversal of the Division in *In re N.I.*, noting that “§ 16 suspends the application of . . . the 30-day . . . rule” for some applicants.

when they would have had a two-year span to meet the minimum visiting requirement (2021-2022). Likewise, for such applicants, the 30-day rule could not be fully applied until 2026, when they would have had a five-year span to assemble their 30 days in Alaska. Alternatively, 2020 could be excised in the middle of the operative years. Thus for a 2022 PFD applicant, the Division would look at 2019 and 2021 for the 72-hour rule and 2016-2019 and 2021 for the 30-day rule.

These may sound like lengthy suspensions of the full effect of the Alaska presence rules, particularly with respect to the 30-day requirement. However, one must remember that it would only apply to applicants who can show they meet the first criterion of Section 16. That is, they must demonstrate to the department that they had a failure to return in 2020 that was *caused* by COVID-19 restrictions and precautions. In addition, in connection with the second “only reason” criterion, they must still show that the thwarted return trip in 2020, when added to whatever other Alaska time they have, would have put them over the threshold—that is, that the lost trip was the “reason” for their shortfall.

Looking at C. J.’s situation, under the second interpretation he would qualify for a 2022 dividend. He spent six days in Alaska in 2017, 13 days in 2019, 48 hours in 2020 on emergency leave, and would have spent an additional 18 days in Alaska in 2020 but for COVID-related military orders. Those cancelled travel plans would have fully satisfied the 72-hour and 30-day rules, so their COVID-related cancellation is the reason he did not satisfy these rules. Looking at the 72-hour rule, whether you wait to apply it to C. J. until 2023 (in which case it is not an issue here) or look to 2019 and 2021 as the qualifying years (during which he spent 13 days here) C. J. would qualify for a 2022 PFD.²⁹ As to the 30-day rule, the 2022 dividend year is the first one where this rule could apply to C. J. based on his absence for military service. If you remove 2020 from consideration, however, the rule would not yet apply. Accordingly, C. J. would be eligible for a 2022 PFD.

It is a close call which of these two interpretations to apply. The Division’s interpretation is not directly at odds with the language of SB 241 and its implication of short-term duration. But the Division’s interpretation is inconsistent with the multi-year periods the Legislature provided for applicants to satisfy the 72-hour and 30-day rules under any circumstances, and it

²⁹ Additionally, the Commissioner could waive the 72-hour rule for C. J. because he was under military orders in a time of national military emergency.

inserts a “final cause” concept into Section 16 that is nowhere to be found in its text. It does, however, make for easy administration: the Division could simply forget about SB 241 from 2022 forward.

The second interpretation honors the Legislature’s intent—not addressed in SB 241 but found in the existing statutes—for applicants to have two and five years to satisfy these requirements, along with its intent for 2020 COVID travel restrictions not to be an impediment to eligibility. The Division correctly pointed out that the Legislature intended SB 241 to be a temporary measure. But the fact that it provided eligibility for people who otherwise failed to satisfy the 72-hour and 30-day rules demonstrates an intent to avoid penalizing those whose plans to comply with these rules were thwarted by a pandemic. There may, however, be some administrative burden that would come with choosing the second interpretation: for a small group of applicants among those whose applications failed to meet the 72-hour or 30-day requirement in 2022, the Division might need to inquire further about the reasons for their shortfall. Depending on the response, it might need to make a note in their ongoing record to be used when reviewing the 30-day requirement (only) for several more years. This is not fundamentally different from what the Division does in many contexts, and it is not absurd, but it is not a burden that can be overlooked.

The Commissioner (the final decisionmaker in this case) is tasked with choosing an interpretation of this ambiguous statute that is “reasonable” and in keeping with “fundamental policies within the scope of the agency’s statutory function.”³⁰ Both interpretations are reasonable. The second interpretation is slightly more in keeping with the full range of the Legislature’s priorities as reflected in not only SB 241 but in the broader PFD eligibility structure. That said, if the Commissioner finds it to be unworkable as a matter of program administration, he could select the first interpretation without violating expressed Legislative intent.

OAH does not, in this situation, have more than rudimentary insight into the practicalities of program administration that conceivably may tip the balance toward the first interpretation.

³⁰ See *Marathon Oil Co. v. State, Dep’t of Natural Resources*, 254 P.3d 1078, 1082 (Alaska 2011).

Rather than speculate on those matters, this decision recommends selecting the second, more expansive interpretation of Section 16 so as to more fully align with Legislative priorities.³¹

Accordingly, C. J. should be eligible for a 2022 PFD.

IV. Conclusion

For the reasons discussed above, the Division's decision denying a 2022 PFD for C. J. is reversed.

DATED: March 24, 2023.

Signed

Rebecca Kruse
Administrative Law Judge

³¹ In addition, in the case of K. J. and her child and with respect to the 2022 dividend year only, the Commissioner could reach this result under his special waiver authority under AS 443.23.005(f), which was discussed without recommendation on pages 3-4 above.

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 4th day of May, 2023.

By: *Signed* _____
Adam Crum
Commissioner, Department of Revenue

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