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

In the Matter of	)	
	)	
K. J. and C. J., D. J. & B. J. (Minors)	)	OAH No. 22-0905-PFD
	)	Agency Nos. 2022-055-
	)	9762/9769/9773/9775
	)	

DECISION

I. Introduction

K. J., a military spouse, was found ineligible for the 2022 Permanent Fund Dividend (PFD) because the PFD Division determined that, while she was living out of the state on an allowable absence, she had failed to be physically present in Alaska for at least 72 hours in the two years preceding the dividend year. As to her three minor children for whom she acted as sponsor, the Division found ineligibility on the same basis and on the additional (derivative) basis that their sponsor was ineligible. After unsuccessfully pursuing an informal appeal, K. J. appealed to the Office of Administrative Hearings (OAH). Her appeal for herself and the three children was heard on December 27, 2022, with supplemental briefing continuing into January.

This decision concludes that there is a close question of statutory interpretation which the Commissioner of Revenue could resolve for or against the J family, but that on balance the information within the purview of OAH favors a resolution that finds the J family eligible in 2022.

II. Facts

K. J. is an Alaskan from birth who has received a dividend almost every year from the early days of the program.[1] She married M. J., another Alaskan, in 2008, and the couple continue to have important family connections in the state.[2] M. J. and K. J. have four children: the three (ages 9-16) who are parties to this case, and a baby born in 2020. In recent years, M. J. has had a series of active-duty Army postings outside Alaska, and the family has accompanied him to those duty stations.[3]

The J family had an extended visit to Alaska in late 2017 and early 2018.[4] They did not come to the state in 2019. In 2020, prior to the pandemic, they had plans to visit Alaska during

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1 Ex. 1, p. 6.
2 Stipulated at hearing.
3 Ex. 1, pp. 3, 10, 14, 19.
4 *E.g.,* Ex. 3, p. 1.

August. However, K. J. gave birth in March after a difficult pregnancy, and concerns about COVID-19 risk to herself and the baby caused the J family to cancel the family trip.[5] The failure of K. J., C. J., D. J. and B. J. to visit Alaska in 2020 was "because of" conduct related to avoiding or preventing the spread of COVID-19.[6] (M. J., though subject to a stop-movement order from the military, was unexpectedly allowed to take a solo trip to Alaska in the summer of 2020 due to an extraordinary family tragedy).[7]

In 2021, the J family again did not come to Alaska. The reasons for not coming to Alaska that year were a combination of financial pressures and worries about the safety of flying during the pandemic.[8]

In 2022, the J family all visited Alaska for ten days.[9]

It was stipulated at hearing that the J family did not sever their Alaska residency as a result of their failure to visit the state in 2019-21.

III. Discussion

A. The Alaska Visitation Requirements

Generally, a person must physically reside in Alaska to be eligible for a PFD, and must be absent from the state for no more than 180 days in any given qualifying year. But certain long-term absences are allowed, including for active military service or for accompanying a spouse or parent who is in military service.[10]

Individuals fitting one of the long-term absence criteria must still meet an eligibility requirement of spending at least 72 consecutive hours in Alaska during the prior two years.[11] In 2013, the legislature adopted an additional requirement for persons who have had an allowed absence from the state for five consecutive years: these individuals must have spent at least 30 days in Alaska during that time to remain eligible for a PFD.[12] Under these two provisions, for a 2022 PFD, the operative period for satisfying the 72-hour rule would be 2020-2021, and the period for satisfying the 30-day rule would be 2017-2021. In this case, only the 72-hour rule is

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5 Testimony of K. J.

6 The fact that the failure to return in 2020 was "because of" COVID-19 precautions is not contested, and for this reason the J dependents were ultimately paid a 2021 PFD on the basis of the § 16 SB 241 exception discussed later in this decision.

7 Testimony of K. J.; Ex. 8, p.4; Ex. 6, p. 4.

8 Testimony of K. J.

9 *Id.*

10 *See* AS 43.23.008(a)(3).

11 AS 43.23.005(a)(4).

12 AS 43.23.008(d).

at issue for the J family. However, some of the legal interpretation involved in resolving the case touches on the 30-day rule as well.

B. Commissioner's Authority to Waive the 72-Hour Rule for Military Families

The Commissioner has flexibility to waive the 72-hour rule for an applicant under military orders, and for that person's spouse and dependents, during a "time of national military emergency."[13] In prior years, the Commissioner has issued blanket waivers for applicants meeting certain requirements, such as receipt of imminent danger or hostile fire pay.[14] 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."[15] President George W. Bush declared a national emergency on September 14, 2001.[16] That proclamation has never been lifted, and it has been expressly extended by Presidential orders in each year since 2001.[17] 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 military family applicants in the 2022 dividend year. This could be done either through a broad-based declaration, perhaps based on generalized circumstances such as the relatively strict no-unnecessary-travel directives imposed on military members during the pandemic,[18] or it could be applied on a case-by-case basis. However, since the Commissioner has not yet exercised this authority with respect to 2022 nor with respect to this family, it will not be applied in this decision absent a Commissioner revision at the adoption stage under AS 44.64.060(e)(3).

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[13] AS 43.23.005(f)(1). Until mid-2022, this statutory language appeared at AS 43.23.005(e)(1).

[14] *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.

[15] AS 43.23.005(f)(1) (formerly AS 43.23.005(e)(1)).

[16] 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.

[17] 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).

[18] If this were done, some prior denials would need to be reversed.

C. Effect of SB 241

Putting aside the broad authority to waive the 72-hour rule for military families (as well as another exclusion, wholly inapplicable here, for certain individuals in state custody[19]) the only potential exclusion to the 72-hour and 30-day rules is found in uncodified 2020 legislation known as SB 241. The Alaska Legislature passed SB 241 in late March of 2020 to provide relief from the impacts of COVID-19 on the operation of a number of state programs. The Governor signed the bill into law on May 18, 2020. Regarding PFD eligibility, Section 16 of SB 241 amended the uncodified law to state:

> ALLOWABLE ABSENCE FOR THE PERMANENT FUND DIVIDEND. 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.[20]

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."

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.[21] 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 absence during 2020. The clear aim of this aspect of Section 16 was to affect the 2021 dividend year, for which 2020 was the qualifying year. Thus, typical "snowbirds," for example, who could not return for the summer due to the pandemic, would remain eligible in 2021 even though they did not have one of the traditional long-term

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19 *See* AS 43.23.005(f)(2) (formerly AS 43.23.005(e)(2)).

20 AK LEGIS 10 (2020), 2020 Alaska Laws Ch. 10 (S.B. 241).

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

allowances (such as military service) but their time out of the state might exceed 180 days. This first and most obvious effect was the only one that was noted in commentary on the new section as it was being added to the bill.[22]

Nonetheless, by providing for PFD eligibility "notwithstanding" the 72-hour and 30-day rule, Section 16 had two additional effects. It 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. Since the 72-hour and 30-day rules could only be relevant during the seven-month life of Section 16 in connection with *future* dividends—that is, for 2021 and perhaps later dividends[23]—it was clear that the two additional impacts of Section 16 were intended to continue in some manner beyond the date of the repealer provision in Section 34. As they relate to the 2021 dividend year, these additional effects have already been addressed in prior appeal decisions of the Department of Revenue.[24]

The question presented now is whether these two additional effects carry over to the 2022 dividend year and, if so, how they operate. In denying the 2022 dividends of the J family, the Division has taken the position that Section 16 of SB 241 can have no effect at all on 2022 eligibility.[25]

As the Division has pointed out in briefing, 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

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[22] 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).

[23] An absence *during 2020* could have no effect on 2020 eligibility in connection with the 72-hour or 30-day rules.

[24] *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 *In re N.I.*

[25] Before embarking on an analysis of this position and the alternatives to it, let us briefly detour to address the language in Section 16 that limits its exemption to a person "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." 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.

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 has to 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 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. K. J. has met that threshold, however: she did plan family travel to Alaska in the summer of 2020, but she deferred the travel due to worries about COVID-19 risk to herself and her newborn. This is "conduct . . . related to avoiding or preventing the spread of COVID-19."

The second criterion is more difficult to apply. The 2020 absence has to be the "only reason" K. J. failed to meet the 72-hour threshold.

The "only reason" criterion is one that cannot be given its narrowest conceivable application. Let us take, for example, a person applying for a 2021 dividend who was absent for the entirety of both 2019 and 2020. 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 one could reason that 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 superfluous. Statutes should be construed such that "effect is given to all words in the statute and none are rendered

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

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" 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 meet one of the two time-in-Alaska minima, 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 rule in four years (2016-2019 of the 2016-2020 period), but it is not okay if 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

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

[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.

only be applied if they do not encompass 2020. Hence, for applicants meeting the first criterion of Section 16, the 72-hour rule could only be applied starting in 2023, when they would have had a two-year span to meet the minimum visiting requirement. 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.

At first blush, this sounds like a lengthy suspension 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 K. J.'s situation, under the second interpretation she would qualify for a 2022 dividend—where only the 72-hour rule is at issue for her—because had it not been for COVID-19 she would have had a 72-hour-plus return in 2020 and thus would have met the minimum in 2020-2021. But it does not follow that she could take a pass on the 30-day requirement as time goes forward. If, in 2024, her only Alaska time in the previous five years is the 10-day return trip she made in 2022, SB 241 will not rescue her eligibility. This is because the trip she would have made in 2020 (about 10 days), added to the trip she made in 2022 (10 days) would still not add up to the 30 she would need in the 2019-2023 span. And hence the thwarting of the 2020 trip would in no sense be the "reason" for her failure to reach 30 days.

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 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 found 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 was thwarted by a pandemic. There is, however, an 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 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."[29] 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 doing violence to 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. 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.[30]

D. Sponsorship

As to the 72-hour rule as a basis for denial, the above reasoning applies equally to K. J. and to the three children. However, the children were separately denied for an additional reason:

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

[30] 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.

lack of an eligible sponsor. But if K. J. is found eligible, the children have an eligible sponsor, and the second basis for denial of their applications goes away.

IV. Conclusion

The denials of the 2022 PFD applications of K. J., C. J., D. J., and B. J. should be reversed.

DATED this 21st day of March, 2023.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, 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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 5th 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.]