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

In the Matter of	)	
	)	
N.J. & E.J. and S. J., F.J. & T.J. (Minors)	)	OAH No. 23-0014-PFD
	)	Agency Nos. 2022-013-
	)	5440/5608/5684/5879/5984
	)	

DECISION

I. Introduction

N.J., an Army officer, and his wife were found ineligible for the 2022 Permanent Fund Dividend (PFD) because the PFD Division determined that, while they were living out of the state on an otherwise allowable absence, they had failed to be physically present in Alaska for at least 30 days in the five years preceding the dividend year and thus forfeited Alaska residency. As to the three minor children for whom one of the parents acted as sponsor, the Division found ineligibility on various derivative grounds, including the basis that their sponsor was ineligible. After unsuccessfully pursuing an informal appeal, N.J. and E.J. appealed to the Office of Administrative Hearings (OAH), requesting a hearing by correspondence only.

By notice dated January 9, 2023, N.J., E.J., and the Division were given until February 8, 2023 to send any additional documents or correspondence to OAH for consideration. The Division filed a position statement outlining in detail the concerns it had about the J family's eligibility. N.J. and E.J. did not file anything. N.J. and E.J. had until February 22, 2023 to respond to the Division's detailed filing, but again filed nothing.

This decision concludes that the J family are within the coverage of special pandemic legislation that could have preserved their Alaska residency. However, they have failed to demonstrate that they met the criteria in the special legislation, and therefore the denial of their dividends must be affirmed.

II. Facts

N.J., an active-duty member of the armed forces, and his wife E.J. moved to Alaska in 2013 and became eligible for the PFD beginning in the 2015 dividend year.[1] In July of 2015 N.J. began a series of out-of-state postings, and E.J. and the couple's growing family joined him at the out-of-state duty stations.[2] In early 2022, the five family members applied for a PFD

[1] Ex. 1, pp. 6, 12; Ex. 6, p. 3.
[2] Ex. 1, pp. 5, 11, 15, 21, 26.

while still living in another state in connection with N.J.'s military service. Later in 2022 N.J. left the military and the family moved back to Alaska.[3]

This case turns on the two parents' days of presence in Alaska in the five-year span from 2017 through 2021. The parties agree to the listing of Alaska visits below:[4]

Dates	**Number of Days**
September 19-27, 2017	8
June 15-21, 2018	6
December 17-21, 2020	4
Five-year total	*18*

A significant period to be considered in this case is the period between March 11 and November 15, 2020. Although the J family did not visit Alaska during that period, they have made vague references that their "2020 summer travel plans were canceled" due to a Department of Defense Travel Restriction Order.[5] This decision assumes, without making a finding, that the "2020 summer travel plans" included a visit of some kind to Alaska.

N.J. reports that his "2020 December trip was drastically shortened to accommodate COVID-19 travel restrictions by order of the [Department of Defense]."[6] This statement is accepted as true for purposes of this decision.

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.[7]

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.[8] In 2013, the legislature adopted an additional requirement for persons who have had an allowed

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3 Ex. 8, p. 19.
4 *E.g.*, Ex. 3, p. 3.
5 Ex. 3, p. 4; *see also* Ex. 3, p. 8.
6 Ex. 3, p. 4.
7 *See* AS 43.23.008(a)(3).

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; if they have not, the department "shall" presume that they have lost their Alaska residency.[9] 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 30-day rule is at issue for the J family. However, some of the legal interpretation involved in resolving the case touches on the 72-hour rule as well.

B. Effect of SB 241

As shown by the table above, the J family failed to meet the 30-day total in the five years preceding 2022. The only potential exclusion to the 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.[10]

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.[11] It remained in the final legislation that emerged from a House-Senate conference committee two days later.

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8 AS 43.23.005(a)(4).
9 AS 43.23.008(d).
10 AK LEGIS 10 (2020), 2020 Alaska Laws Ch. 10 (S.B. 241).
11 House Journal, March 26, 2020, pp. 2112-2113.

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 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.[12]

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[13]—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.[14]

A question that remains undecided as of the writing of this decision 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.[15]

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[12] 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).

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

[14] *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.*

[15] 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

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.'"[16]

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. The J family potentially meet that threshold, however: they assert that they had "2020 summer travel plans" that "were canceled" due to COVID-19.[17] Surmising that these plans involved travel to Alaska, this is "conduct . . . related to avoiding or preventing the spread of COVID-19."

The second criterion is more complicated to apply. The 2020 absence has to be the "only reason" the J family 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

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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.

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

[17] Ex. 3, pp. 4, 8.

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 superfluous."[18] 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.[19]

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 direct evidence of the Legislature's intent on this point. The Division's interpretation is not directly at odds with the language of SB 241 and accords with its implication of short-term duration. But the Division's interpretation effectively shortens the five-year period the Legislature provided for applicants to satisfy the 30-day rule, and it inserts a "final cause" concept into Section 16 that is nowhere to be found in its text.

A second potential interpretation is 241 would be to remove the seven-month period in 2020 from consideration, such that the two-year lookback and five-year lookback can only be applied if they do not effectively penalize the person for not completing travel that was thwarted by COVID-19 during the seven-month period. Thus, if a person would have met the 30-day

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

[19] *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.

requirement had COVID-19 not prevented travel between March 11 and November 15, 2020, the 30-day rule would not apply. This would be so regardless of whether the person could have "made up" for the lost 2020 travel by traveling to Alaska in 2021.

In this case, it is not necessary to resolve the competing potential interpretations of Section 16. If the Division is correct, the J family obviously fail to meet the 30-day rule because they did not rectify the deficit in Alaska days during 2021 and they had only 18 days of time in Alaska in the 2017-2021 five-year span. If the broader interpretation is chosen, however, the J family still fall short. This is because, in connection with the second "only reason" criterion, they must still show that the thwarted return trip in the summer of 2020, when added to whatever other Alaska time they have, would have put them over the threshold—that is, that the lost trip in the summer of 2020 was the "reason" for their shortfall.

N.J. and E.J. have provided no details of the anticipated travel to Alaska in the summer of 2020 that they say was prevented by COVID-19. But there is no basis in the record to suppose that it would have lasted long enough to bring the J family up to the 30-day threshold for 2017-21. The pattern of the J family travel is one of very short visits to Alaska, never exceeding eight days in the last five years. A visit of even eight days would have left the J family short of the 30 needed to preserve residency.

N.J. and E.J. also contend that their four-day visit to Alaska in December 2020 was shortened by COVID-19. However, December 2020 falls outside the coverage of Section 16, and thus any shortening of that visit due to the pandemic cannot be excused through SB 241.

C. *Termination of Residency*

In sum, SB 241 does not prevent the operation of AS 43.23.008(d) in this instance. In the latter statute, the Legislature required the Department of Revenue to presume that an applicant such as N.J. or E.J. was "no longer a state resident." Because the J family were no longer state residents for PFD purposes, they were not eligible for a dividend in 2022.[20]

While somewhat harsh in the context of a family that clearly intended to return to Alaska—and in fact did return a few months after applying for the 2022 dividend—the rule in AS 43.23.008(d) is a bright-line rule that allows the department no discretion. Such rules have

[20] AS 43.23.005(a)(2) (applicant must be a state resident on the date of application).

consistently been found to be permissible in the context of the state's effort to administer an enormous program such as this one.[21]

It is important to note that the required presumption under AS 43.23.008(d) applies only to the Department of Revenue. It is possible that the J family could appropriately still be treated as residents throughout 2022 by other state departments and programs. With respect to PFD eligibility, however, residency was lost and will have to be reestablished beginning with the family's return to Alaska in the summer of 2022.

D. Children's Eligibility

Because N.J. and E.J. lost Alaska residency for PFD purposes, their children lost residency as well.[22] Moreover, the children lacked eligible sponsors to file 2022 applications on their behalf.[23]

IV. Conclusion

The denials of the 2022 PFD applications of N.J., E.J., S. J., F.J., and T.J. are affirmed.

DATED this 22nd day of March, 2023.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

[21] *See, e.g., Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130-31 (Alaska 1999).
[22] *See In re R.E.* OAH Case No. 06-0385-PFD (Dep't of Revenue 2006).
[23] 15 AAC 23.113(b)(1).

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 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.]