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

In the Matter of	)	
	)	
Q. & M. K.and N. & F. K. (Minors)	)	OAH No. 23-0327-PFD
	)	
2022 Permanent Fund Dividends	)	
	)	

DECISION

I. Introduction

Major Q. K., an Air Force pilot, 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 two minor children for whom Major K. acted as sponsor, the Division found ineligibility on the single basis that their sponsor was ineligible (both girls were too young for the five-year rule to apply to them). After unsuccessfully pursuing an informal appeal, the K.s appealed to the Office of Administrative Hearings (OAH), requesting a hearing by correspondence only.

By notice dated May 16, 2023, the K. family and the Division were given until June 15, 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 K.s' eligibility. The K.s did not file anything. The K.s had until June 29, 2023 to respond to the Division's detailed filing, but again filed nothing.

This decision concludes that the K. family are within the coverage of special pandemic legislation that could preserve their Alaska residency. However, M. K. has failed to demonstrate that she met the criteria in the special legislation, and therefore the denial of her dividend must be affirmed. The other denials should be reversed.

II. Facts

Major K. is an active-duty member of the armed forces. He and his wife, M. K., moved to Alaska in 2012 and became eligible for the PFD beginning in the 2015 and 2014 dividend years, respectively.[1] In the summer of 2016 Major K. began a series of out-of-state postings, and Laura joined him at the out-of-state duty stations, with the two children born to them while they were out of state. In early 2022, the four family members applied for a PFD while still living in another state in connection with Major K.'s military service.[2]

This case turns on the two parents' days of presence in Alaska in the five-year span from 2017 through 2021. There is no dispute regarding the summary of Alaska visits below:

Q. K.	
Dates	**Number of Days**
April 8-11, 2019	3
May 27-30, 2019	3
July 9-10, 2019	1
August 20-29, 2019	9
January 23-24, 2020	1
July 13-20, 2021	7
Five-year total	*24*

M. K.	
Dates	**Number of Days**
August 20-29, 2019	9
July 13-20, 2021	7
Five-year total	*16*

A significant period to be considered in this case is the period between March 11 and November 15, 2020. Although the K.s did not visit Alaska during that period, they have proved by clear and convincing evidence that, several months in advance, they had purchased tickets for an eight-day visit to Alaska to occur in July 2020.[3] These had to be canceled due to a Department of Defense Travel Restriction Order and other Covid-related circumstances.[4]

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1 Ex. 1, pp. 6, 12.
2 Ex. 1.
3 Ex. 6, pp 12-16.
4 Ex. 6, p. 3.

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.[5]

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.[6] 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; if they have not, the department "shall" presume that they have lost their Alaska residency.[7] 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 K.s.

B. Effect of SB 241

As shown by the tables above, Major and Mrs. K. 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

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

6 AS 43.23.005(a)(4).

7 AS 43.23.008(d).

> maintaining a voluntary or compulsory quarantine, related to avoiding or preventing the spread of COVID-19.[8]

SB 241 also contained, at Section 34, a broad delayed repeal 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, and it was ambiguous in various respects. In early 2022, a series of recommended decisions from the Office of Administrative Hearings (OAH) were presented to the Commissioner of Revenue, offering him two acceptable interpretations of this language. The Commissioner—not OAH[9]—made the final call as to the Department of Revenue's final, official interpretation of this legislation.

The Commissioner chose an interpretation that potentially removes 2020 from consideration for certain applicants, such that the five-year lookback can only be applied if the years examined do not encompass 2020. Hence, for applicants meeting the other requirements of Section 16, 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.[10]

One must remember, however, that this restriction on applying the five-year lookback only applies to applicants who can show they meet Section 16 in all other respects. Specifically, 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 in Section 16, *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 30-day threshold*—that is, that the lost trip was the "reason" for their shortfall.

Mrs. K. fails on the portion of the test that is italicized above. Even if she had made the one trip she had planned to Alaska in 2020, she still would have fallen short of the 30-day minimum over five years.[11] Her total would have added up to 24 days.

Major K., however, is able to meet the threshold with the aid of Section 16 of SB 241. He had purchased an eight-day trip to Alaska, falling within the span of dates in Section 16, that

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

9 In certain rhetorical excesses in its Position Statement in this case, the PFD Division loses sight of this. The Commissioner made the decision, and he knew exactly what he was doing.

10 *See, e.g.*, *In re C.I.,* OAH Case No. 23-0059-PFD (Commissioner of Revenue 2023).

11 N. K. is likely to run into this hurdle as well in future dividend years, once the five-year lookback starts applying to her.

had to be canceled due to Covid-19. Had he been able to complete that trip, his 2017 to 2021 total would have been 32 days, enough to avoid losing his residency.

C. *Termination of Residency for M. K.*

In sum, SB 241 does not prevent the operation of AS 43.23.008(d) in the case of M. K. In the latter statute, the Legislature required the Department of Revenue to presume that an applicant such as Mrs. K. was "no longer a state resident." Because she was no longer a state resident for PFD purposes, she was not eligible for a dividend in 2022.[12]

While somewhat harsh in the context of a military dependent who seems to intend to return to Alaska, the rule in AS 43.23.008(d) is a bright-line rule that allows the department no discretion. Such rules have consistently been found to be permissible in the context of the state's effort to administer an enormous program such as this one.[13]

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 Mrs. K. could appropriately still be treated as a resident 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 her eventual return to Alaska to live in the state.

D. Continuation of Residency of Major K.

Because undisputed evidence shows that, with the help of SB 241, Major K. meets the 30-day requirement, his residency is not terminated by the AS 43.23.008(d) presumption. The Division has not argued that there is any other reason to doubt his continued status as an Alaska resident, and there is no other basis to deny his dividend.[14]

E. Children's Eligibility

Because Major K. did retain eligibility, the children did not lack an eligible sponsor to file 2022 applications on their behalf.[15] Since lack of an eligible sponsor was the sole reason for the denial of their applications, that denial must be reversed.

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

[13] *See, e.g., Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130-31 (Alaska 1999).

[14] The Division noted that the K.s "maintained their principal home outside Alaska during calendar year 2021." Position Statement at 3. However, this is not disqualifying for an Alaska resident who is allowably absent on active-duty military service.

[15] 15 AAC 23.113(b)(1).

IV. Conclusion

The denial of the 2022 PFD application of M. K. is affirmed. The denials of the 2022 PFD applications of Q., N., and F. K. are reversed.

DATED this 31st day of August 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 25th day of September, 2023.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

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