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

In the Matter of	)	
	)	
F & B.E	)	OAH No. 21-2161-PFD
	)	

DECISION

I. Introduction

F & B.E are long-term Alaskans who have been living out of state while Mr. E serves in the United States Air Force. The E's frequently visit Alaska and planned to do so in summer 2020. That visit would also have maintained their Alaska residency for purposes of Permanent Fund Dividend("PFD") eligibility. But the E's' plans were derailed by the COVID-19 pandemic and the travel restrictions the military imposed to slow the spread of the virus. The Legislature passed a law to address PFD eligibility for people quarantined out of state during the pandemic. The Department of Revenue Permanent Fund Dividend Division ("Division"), however, determined that this law did not apply to the E's and denied their 2021 PFDs. The Division submitted supplemental guidance from Department of Law, however, stating that the Division's interpretation of the law is incorrect. Applying this law here, the E's have demonstrated they are eligible. Accordingly, the Division's decisions denying 2021 PFDs for the E's are reversed.

II. Background

F and B.E grew up in Alaska and are long time Alaska residents.[1] They have been living outside the State since 2010 while Mr. E serves as a medic in the United States Airforce.[2] Mr. E has been stationed at Military Base 1 near City A, State B since 2016.[3]

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.[4] In 2013, the legislature adopted a requirement that 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

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1 Ex. 1 at 6, 12.
2 Ex. 1 at 1; Ex. 7 at 3.
3 Ex. 2 at 3.
4 AS 43.23.008(a)(3).

for a PFD.[5] Thus when the E's applied for 2021 PFDs, they needed to have spent 30 days in Alaska between January 1, 2016 and December 31, 2020.

The Division determined that the E's were just shy of meeting the 30-day requirement. According to Mr. E, he and his wife typically visit every summer for a week or more.[6] From 2016 through 2019, the Division calculated the E's spent between 26 and 29 days in Alaska, depending on the timing of flight departures after midnight.[7] Mr. E requested leave in June and July 2020 so he and his wife could travel to Alaska.[8] A trip for that length of time would have included enough days in state for the E's to meet the 30-day requirement. Ms. E had additionally purchased plane tickets for March 2020 to visit her grandfather in Alaska.[9]

The COVID-19 pandemic thrust the entire world into disarray in 2020, including the E's' travel plans. The Department of Defense imposed a stop movement order in March, restricting U.S.-based service members to their local areas.[10] Ms. E had to cancel her plans to fly to Alaska that month as the E's were initially quarantined in their home for two weeks.[11] After that, Mr. E was able to return to work, but under strict guidance not to go anywhere but work or home unless essential.[12] As a medic, Mr. E was under even stricter COVID restrictions than the rest of the base.[13] His work put him at the forefront of the pandemic, working on COVID screening and tracking and working long hours, seven days a week, for months on end throughout 2020.[14] Because of Mr. E's role in fighting COVID, it was recommended that his wife leave their home for only essential items as well. Ms. E heeded that advice and stayed at home, caring for their children.[15]

Mr. E's commander denied leave for everyone in 2020. He himself requested leave three times, and each time it was cancelled or denied.[16]

In May 2020, the Alaska Legislature passed SB 241 to extend COVID relief under a number of state laws. For PFD-eligibility, SB 241 amended the uncodified law to state:

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5 AS 43.23.008(d).
6 E testimony.
7 Division Corrected Position Statement at 2.
8 E testimony.
9 *Id.*
10 Ex. 7 at 3; E testimony.
11 E testimony.
12 *Id.*
13 *Id.*
14 Ex. 7 at 3; E testimony.
15 E testimony.
16 Ex. 7 at 3; E testimony.

> 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, 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.[17]

Despite this temporary modification to the law, the Division denied the E's' 2021 PFD, finding that Mr. E did not satisfy the 30-day rule and therefore was no longer an Alaska resident.[18] Because Mr. E was not eligible for a PFD, the Division found his wife ineligible as well.[19]

A hearing was held on November 16, 2021. Mr. E provided testimony and Ms. E was also present. Peter Scott represented the Division. The record was reopened for the Division to submit additional guidance by the Department of Law by December 2, 2021.

III. Discussion

To be eligible for a 2021 PFD, the E's need to meet the residency requirements specific to PFDs.[20] The E's have the burden of showing that the Division incorrectly found that they were not eligible. [21]

The issue here is whether the SB 241 language quoted above allows the E's to be eligible for 2021 PFDs despite not satisfying the 30-day rule.

The Division initially took the position that SB 241 would provide eligibility only for a person who needed merely to arrive in Alaska to be eligible, not a person who needed to arrive and remain for a period of time like the E's.[22] That interpretation would effectively make SB 241 inapplicable to persons needing to satisfy the 30-day rule, which is at odds with the legislature's prefatory language that this provision applies "[n]otwithstanding . . . 43.23.008(d)

17 AK LEGIS 10 (2020), 2020 Alaska Laws Ch. 10 (S.B. 241).
18 Ex. 3 at 1-2, Ex. 6.
19 Ex. 3 at 3-4.
20 AS 43.23.005(a)(3); AS 42.23.008(a)(13).
21 15 AAC 23.173(i); 15 AAC 05.030(h).
22 Scott statement at hearing.

[the 30-day rule]."[23] There is no applicable legislative history for this provision. But examining the language itself, "notwithstanding" generally means that the language that follows will override otherwise contradictory provisions.[24] For this provision in particular, the fact that the legislature expressly cited the potential conflict with 43.23.008(d) indicates an intent for this provision to override that conflict. Otherwise there would have been no need to add the "notwithstanding" language. The "notwithstanding" in SB 241 would thus mean that even though another law requires a cumulative 30 days' physical presence, SB 241 is providing for PFD eligibility.

It is further evident from the bill as a whole that the legislature passed the law to address impacts of the COVID-19 pandemic on various state laws. Other portions of the bill imposed temporary measures to decrease travel or in-person interactions, including provisions addressing electronic shareholder meetings, telemedicine, and electronic shareholder meetings.[25] If the legislature was concerned about voters, shareholders, and medical patients transmitting the virus, it stands to reason they would have been equally concerned about military servicemembers risking exposure to return to the state simply to fulfill PFD eligibility requirements. The bill also includes provisions to ease administrative burdens on the public during the pandemic, including extending PFD and tax filing deadlines. The provision allowing people quarantining out of the state to be eligible for a PFD similarly eases the burden of maintaining eligibility in the face of unprecedented obstacles.

The Division may now agree. In its December 2, 2021 supplemental filing, the Division quotes language from Department of Law that "'[n]otwithstanding' means 'in spite of.' With this rule of statutory construction and this definition in mind, §16 of SB 241 suspends the application of AS 43.23.008(d)."[26] Thus it is appropriate for the Department, consistent with the language of this uncodified law and the overall purpose of SB 241, to reverse its position on interpreting SB 241 to be inapplicable to persons needing to satisfy the 30-day rule.

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

24 *See*, *e.g.*, *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.").

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

26 Supplemental Submission by the Division.

Accordingly, under SB241, if a person was absent from Alaska during the COVID-19 public health disaster to prevent the spread of the virus, that absence alone will not bar PFD eligibility, including for people who needed to return to the state to satisfy the 30-day rule.

Applying SB 241 to the E's, they would need to (1) have been absent from the state to avoid or prevent the spread of COVID-19, including a voluntary or compulsory quarantine; (2) have notified the Department of Revenue Commissioner or designee of the absence; and (3) be eligible for a PFD but for that absence.[27] The E's demonstrated that they were absent from Alaska in 2020 to prevent the spread of COVID-19. Mr. E was under COVID-related travel restrictions imposed by the military from the onset of the pandemic through the end of 2020.[28] Ms. E was under similar restrictions as the spouse of a medic.[29] At the hearing, the Division agreed that the E's had satisfied the notice requirement of SB 241 as well.[30] And the Division's bases for denying eligibility all stemmed from the E's' absence from the state and failure to satisfy the 30-day rule.[31] Because the E's were absent from Alaska in 2020 to prevent the spread of COVID, they provided the required notice, and they were eligible but for that absence, the E's should be eligible for 2021 PFDs under SB 241.

IV. Conclusion

The E's have met their burden to show they are eligible for 2021 PFDs. Accordingly, the Division's decisions denying those PFDs are reversed.

Dated: December 13, 2021

Signed

Rebecca Kruse
Administrative Law Judge

27 AK LEGIS 10 (2020), 2020 Alaska Laws Ch. 10 (S.B. 241).
28 E testimony.
29 *Id.*
30 Mr. Scott statement at hearing.
31 Ex. 3.

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 6th day of January, 2022.

By: *Signed*
Rebecca D. Kruse
Administrative Law Judge

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