

H B

380

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF
HB 380

PFD's for Incompetent Persons

Received January 8, 1990
by Rep. Hudson

Heard April 3, 1990

Adopted CSHB 380 (SA) April 3, 1990

Passed Out of Committee April 3, 1990
4 Do Pass
1 No Recommendation

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FISCAL NOTE

REQUEST

Revision Date: _____
Title: An Act relating to permanent fund dividends for incompetent indiv.
Sponsor: HUDSON
Requestor: _____

Agency Affected: Revenue
BRU: Permanent Fund Dividend Division
Components: Permanent Fund Dividend Division

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
OPERATING						
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LANDS & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: *Ervin Jones* None required.

Prepared By: Ervin Jones
Division: Permanent Fund Dividend Division

Phone: 465-2323
Date: March 30, 1990

Approved by Commissioner: *[Signature]*
Agency: Revenue

Date: 4/1/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Item 3

Alaska State Legislature

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COMMITTEES:

Transportation
Resources
Foreign Trade

FINANCE SUBCOMMITTEES

DOT/PF
C & RA

January 30, 1990

Representative Red Boucher,
Chairman
House State Affairs Committee
Juneau, Alaska

Dear Representative Boucher:

Enclosed is a copy of a letter together with copies of briefs I recently received from Rebecca Graham, Staff Attorney for Advocacy Services of Alaska.

Ms. Graham discusses her past efforts on behalf of incompetent individuals who had not received a Permanent Fund dividend.

My assertion that the Department of Revenue needs direction by statute is supported by the description of the Department's arbitrary actions relating to claims brought by Ms. Graham.

After you have reviewed this material, I hope you will agree to schedule HB 380 for a hearing.

Respectfully,


Bill Hudson

BH:lh

Enclosures





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January 18, 1990

Representative Bill Hudson
P.O. Box V
Juneau, AK 99811

Attn: Landa

Re: Permanent fund dividend checks for people
with disabilities

Dear Representative Hudson:

I spoke today with Rod Moline of REACH in Juneau about the issue of people with developmental disabilities who miss filing deadlines for requesting their permanent fund dividends. He called me because he was aware of a case I recently settled with Department of Revenue. He stated that your office is interested in introducing some legislation to deal with this problem.

I have enclosed a copy of the briefs in the court appeal that I brought on behalf of a man with mental retardation. Basically the facts and issues are set out in the brief of appellant. After this was filed, the court remanded the case back to the Department of Revenue for a hearing to get more facts.

We never had a hearing on any of the issues because the State settled with my client and gave him his 1986 Permanent Fund Dividend. Subsequently the Department also settled with a client of this agency who has a diagnosis of mental illness and had also not applied for a PFD.

I have removed the name of my client to protect his dignity although this case is a public record.

I would be happy to provide any more information about this case or anything else that might be helpful to bring about a statutory resolution to this. I do not think that the current policy of simply settling with those claimants who appeal will be fair to those who have no way of knowing that this is available.

Sincerely,

Rebecca E. Graham
Staff Attorney

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

E J G.)
Appellant,)
v.) Case No. 3AN-88-5268 CI
HUGH MALONE, Commissioner,)
Department of Revenue, State)
of Alaska, in his official)
capacity.)

AN ADMINISTRATIVE APPEAL FROM A FINAL DECISION
OF THE DEPARTMENT OF REVENUE

REPLY BRIEF OF APPELLANT

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I.

- A. MR. G WOULD BE DENIED DUE PROCESS IF NOT ALLOWED TO PRESENT THE ISSUES IN THIS APPEAL.

The State contends that all issues raised by G in this appeal are outside the scope of the administrative proceeding held by the Department of Revenue. The Department quotes AS 43.23.015(g) which states in part:

An appeal under this section does not entitle the aggrieved individual to a trial de novo. The appeal shall be based on the record of the administrative proceeding from which appeal is taken and the scope of appeal is limited to matters contained in the record of the administrative proceeding.

However, Mr. G was not represented by counsel at the administrative hearing and in fact, did not even participate in the hearing in any meaningful way. He was assisted by Ms. Bonnie Darnell, the Administrator of Full Circle Boarding Home, where he lives. [Tr. 14]

Mr. G stated his name at the outset of the hearing [Tr. 14] and his further involvement in the hearing was to occasionally hit a button on the phone he was using. [See Tr. 14, 15 and 16.] It was assumed by everyone involved that Mr. G was not capable of participating any further in the hearing; the Department of Revenue allowed another person to do all of his speaking for him. [Tr. at 17] He certainly was not able to develop any legal

arguments as to why he was entitled to receive his 1986 Permanent Fund Dividend nor was his non-lawyer assistant. It is indeed surprising that the Department of Revenue allowed the hearing to go forward under these circumstances.

Where a deprivation of a government benefit is involved, the United States Supreme Court has required a high degree of due process. See Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring a procedure much like a trial for deprivation of welfare benefits). Certainly an entitlement program like the Alaska Permanent Fund Dividend rises to the level of requiring similar due process protections. See Zobel v. Williams, 457 U.S. 55, 60 (1982).

Since Mr. G was not able to present the constitutional arguments at the earlier hearing due to his disability and the manner in which the hearing was conducted, it would be a denial of due process to dismiss the issues he raises now. A more equitable solution would be to remand the case to the Department of Revenue for a hearing on the issues raised here if the court rules that such issues should not be raised at this time.

B. THIS COURT HAS THE DISCRETION TO RELAX THE RULES REGARDING ISSUES RAISED ON APPEAL.

As the State correctly observes, issues not raised in the lower tribunal are generally waived. Vest v. First National Bank of Fairbanks, 659 P.2d 1233, 1234 n.2 (Alaska

1983). However, the Alaska Supreme Court has recognized some exceptions to the general rule. In Vest, the Court itself required briefing of an issue neither party had raised in the lower court. Id. at 1234. And in Matter of L.A.M., 727 P.2d 1056, 1059 (Alaska 1986), the court stated:

Unless it constitutes plain error, we ordinarily will not consider a claim of error if it was not both argued in the trial court and properly raised on appeal. [Citations omitted.] In order for this court to find plain error, the error must affect substantive rights and be obviously prejudicial. [Citation omitted.] As we stated in Miller v. Sears, 636 P.2d 1183, 1189 (Alaska 1981), "[p]lain error exists where an obvious mistake has been made which creates a high likelihood that injustice has resulted."

There the court found plain error where a parent alleged improper notice in an Indian Child Welfare Act case (plain error not being limited to the Criminal Rules as alleged in Appellee's Brief). In other words, where due process would be denied by failing to allow the issue to be heard, the appellate court may consider an issue not raised at the hearing level. Further, the court has noted that "relaxation of the appellate rules might be especially appropriate where a layman represents himself." Miller v. City of Fairbanks, 509 P.2d 826, 829 n.8 (Alaska 1983).

In a case such as this where the appellant was admitted by all concerned to lack the ability to handle the

hearing himself, the dismissal of his constitutional arguments would be a denial of due process. If this court accepts that the factual issues would be better addressed by an administrative hearing, remand is a more appropriate remedy, preserving due process rights, than dismissal of Mr. G 's claims.

II.

THE DEPARTMENT OF REVENUE DOES NOT PROVIDE SUFFICIENT ASSISTANCE TO DISABLED APPLICANTS.

The State has listed some ways in which it provides assistance to people with disabilities in applying for Permanent Fund Dividends and concludes that these are sufficient under AS 43.23.055(4) which requires such assistance. However, the methods of assistance listed by the Department are completely inadequate for a person with a mental disability. Without an outreach program of some kind, it would be impossible for a person without the capability to read to even know that it was time to make an application. Another alternative is to leave open the filing deadline for all those people who are incapable of knowing of their entitlement to a Permanent Fund Dividend. But to merely state that when a person contacts the Department of Revenue, they will be given assistance misunderstands the nature of many disabilities. Unless every developmentally disabled person in the state of Alaska were in a care-taking relationship or

had a legal guardian, the system contemplated by the State in its brief would not work.

Contrary to the State's position, this is a question of law which should be evaluated by this court under the substantial evidence test. Kelly v. Zamarello, 486 P.2d 906, 916 (Alaska 1971). The Department of Revenue is not charged with having expertise in assisting people with disabilities. It is a question of law as to whether they have fulfilled their statutory mandate to make such assistance available.

As stated above, to deny Mr. G the chance to raise this statutory issue would be a denial of due process. Again, remand for further factual development as the court finds necessary would be a more appropriate remedy than dismissal.

III.

A. THERE IS NO RATIONAL BASIS FOR TREATING MR. G DIFFERENTLY FROM MINORS APPLYING FOR PERMANENT FUND DIVIDENDS.

The State does not deal in its brief with whether there is a rational basis for treating Mr. G differently for purposes of receiving his 1986 Permanent Fund Dividend than the way minors are treated by law. They argue instead that this is a decision which the Department could make in any way which it saw fit. However, where a statute leaves open the method by which an agency may act, that agency must

still act constitutionally. Further that action has nothing to do with agency expertise. A constitutional question of whether equal protection has been denied does not come within the special knowledge and expertise of the Department of Revenue. This is an issue which the courts are uniquely charged with deciding. Kelly v. Zamarello, 486 P.2d 906, 916 (Alaska 1971).

B. IT IS CONSTITUTIONAL TO PROVIDE DIFFERENT TREATMENT FOR PEOPLE WITH MENTAL DISABILITIES.

Because the Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), refused to make people with mental retardation a suspect class for purposes of equal protection claims, they left open the possibility of treating such people differently. Id. at 433-445.

[L]egislation... singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable.

Id. at 444.

Our legislature has required that the State provide assistance to people with disabilities in applying for and proving eligibility for Permanent Fund Dividends. The question for the court is whether that assistance was ade-

quate to assist people such as Mr. G , not whether to do so would be constitutionally impermissible.

IV.

THE STATE OF ALASKA HAS DISCRIMINATED AGAINST MR. G ON THE BASIS OF HIS DISABILITY.

The Alaska Statutes state at AS 18.80.255(3):

It is unlawful for the state or any of its political subdivisions... to refuse or deny to a person any... state... funds, services, goods, facilities, advantages or privileges because of physical or mental disability.

As stated in appellant's brief, this section of the Alaska Statutes is substantially similar to federal law found at 29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973).¹ Federal decisions and the federal government have consistently required "reasonable accommodation" of a person's disabilities. (See e.g., Nelson v. Thornburgh, 567

¹ That Act provides:

No otherwise qualified individuals with handicaps in the United States, ... shall, by reason of the handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....

Section 7(8) of the Act also tracks the definition of disability found at AS 18.80.300(12).

F. Supp. 369 (E.D. Pa. 1983), aff'd mem., 732 F.2d 146 (3d Cir. 1984), cert. denied, 105 S.Ct. 955 (1985).) This has included requiring what might be seen as "preferential treatment" such as the requirement that deaf people be provided with sign language interpreters and telecommunication devices so that they may be able to receive the benefits of governmental programs. An excellent analysis of what is required is found in Kaufman, Federal and State Handicapped Discrimination Laws: Toward an Accommodating Legal Framework, 18 Loy. U. L.Rev. 1119 (1987). As stated above, it is constitutionally permissible for people with mental retardation to be treated differently than others. See Cleburne, supra.


Similarly, the accommodation necessary for a person with a developmental disability is that the filing deadline be waived in those cases where it would impermissibly deny the person privileges of residency in the State of Alaska under AS 18.80.255(3).

CONCLUSION

Mr. G . should be allowed to present his arguments in this appeal or, in the alternative, to present facts supporting his arguments in an additional administrative hearing. To dismiss this case, as requested by the State, would be a denial of due process. In addition, the issues raised by Mr. G in Appellant's Brief have not

been refuted by the State. It is not impermissible to give reasonable accommodation to people with developmental disabilities as required by state statute.

Respectfully submitted at Anchorage, Alaska this 6th day of September, 1988.



Rebecca E. Graham
Attorney for E. J. G

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

E J G ,)
Appellant,)
v.) Case No. JAN-38-5268 CI
HUGH MALONE, Commissioner,)
Department of Revenue, State)
of Alaska, in his official)
capacity.)

AN ADMINISTRATIVE APPEAL FROM A FINAL DECISION
OF THE DEPARTMENT OF REVENUE

BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS
PRINCIPALLY RELIED UPON

United States Constitution

No person shall... be deprived of life, liberty,
or property, without due process of law....

U.S. Constitution, Amendment V.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV.

Alaska Constitution

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Constitution of Alaska, Section 1.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the

course of legislative and executive investigations shall not be infringed.

Constitution of Alaska, Section 7.

Alaska Statutes

A.S. 43.23.005. Eligibility. (a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if the individual applies to the department, and if on the date of application the individual

(1) is a state resident; and

(2) has been a state resident for a period of at least six consecutive months immediately preceding the date of application.

* * *

(c) A parent, guardian, or other authorized representative may claim a permanent fund dividend on behalf of an unemancipated minor or on behalf of an incompetent individual who is eligible to receive a payment under this section.

AS 43.23.015. Application and proof of eligibility. (a) The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) for determining the eligibility of individuals for permanent fund dividends....

* * *

(c) Except as provided in (d) of this section or as may be provided by regulations adopted by the department, an individual must personally sign the application for permanent fund dividends, including the certification of residency required under (b) of this section.

(d) The application and certification of residency of an unemancipated individual under 18 years of age or of an incompetent individual must

be signed by the individual's parent, legal guardian, or other authorized representative.

* * *

(g) If an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may appeal that decision to the superior court in accordance with AS 44.62.560....

AS 43.23.055. Duties of the department. The department shall

* * *

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual; and

(4) assist residents of the state, particularly in rural areas, who because of language, disability, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

Alaska Administrative Code

15 AAC 23.645. APPLICATION ON BEHALF OF AN INCOMPETENT, DISABLED, OR OTHER ADULT. (a) An application for a permanent fund dividend may be filed on behalf of an incompetent adult only by the incompetent adult's guardian or conservator appointed under AS 13.26 or other similar provision of law of this state or of another jurisdiction.

(b) An application for a permanent fund dividend may be filed on behalf of a disabled adult only by the adult's spouse, parent, legal guardian, or other authorized representative.

(c) For good cause shown, the following persons may file an application for a permanent fund dividend on behalf of an adult who is neither incompetent nor disabled: (1) the adult's legal guardian; or (2) the adult's spouse, parent, or other authorized representative having a power of attorney.

(d) Evidence of the authority of the individual applying on behalf of an adult under this section must be attached to the application and the circumstances requiring the signature by someone other than the applicant must be clearly set out. The individual making application on behalf of another adult must certify to the facts underlying the adult's eligibility for a permanent fund dividend payment and must sign the application on behalf of that adult.

(e) An individual applying on behalf of another adult must comply with 15 AAC 23.625.

I. JURISDICTIONAL STATEMENT

This action is an administrative appeal from a final decision of the Department of Revenue of the State of Alaska made on April 12, 1988. Jurisdiction is conferred on the superior court by AS 43.23.015 and AS 44.52.560.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Whether the Department of Revenue has violated Mr. G's rights by not having a system in place under AS 43.23.055(4) to assist people with disabilities in applying for Permanent Fund Dividends.

2. Whether the Department of Revenue has denied Mr. G equal protection of the laws in violation of the U.S. and Alaska constitutions by treating people with mental disabilities differently than minors are treated.

3. Whether the Department of Revenue has unlawfully discriminated on the basis of disability against Mr. G under AS 18.80.255(3).

III. STATEMENT OF THE CASE

A formal hearing was held by telephone by Revenue Hearing Examiner Myron W. Klein on March 23, 1988. [Record at 5] Mr. Klein found on April 8, 1988 that Mr. G was

not eligible for a 1986 Permanent Fund Dividend because no timely application had been filed for him. [Record at 9] An order of adoption of Mr. Klein's decision was signed by Hugh Malone, Commissioner of Revenue on April 12, 1988. The present action is an appeal of that decision.

IV. FACTS

E J G is an Alaskan Native who has been diagnosed as having mild mental retardation, a seizure disorder and severe mixed hearing loss. [Record at 38] In 1986 he was a resident of a Hope Cottages group home in their Intensified Learning Services division. [Record at 38] Mr. G did not wish to stay with Hope Cottages but recognized that he needed continued assistance in managing money. [Record at 39] Hope Cottages agreed to

continue to act in a fiduciary capacity for him until such time as a conservator can be appointed or such time as Mr. G determines that he is ready to manage his own financial affairs.

[Record at 39] No one applied for Mr. G 's 1986 Permanent Fund Dividend by July 1 of that year.

By October, Mr. G had moved into another facility, the Full Circle Boarding Home in Wasilla. [Record at 30] The administrator of the home, Ms. Bonnie Darnell, realized that Mr. G had not received his check at the same time as other residents and ascertained that no

application had been made. She then assisted Mr. G in making his application on December 8, 1986. [Record at 28-30a] That application was denied by Janette Hieb, PFD Specialist I on June 16, 1987 on the basis that the application was not timely filed. [Record at 31-33] Ms. Darnell assisted Mr. G in appealing that decision. [Record at 34-43]

V. APPLICABLE STANDARD OF REVIEW

The standard of review in any given case depends on the nature of the relief sought. Four standards have been recognized by the courts in interpreting AS 44.62.570. As stated succinctly in a footnote to Jager v. State, 537 P.2d 1100 (1975):

"These are the "substantial evidence test" for questions of fact, the "reasonable basis test" for questions of law involving agency expertise; the "substitution of judgment test" for questions of law where no expertise is involved; and the "reasonable and not arbitrary test" for review of administrative regulations." [Citations omitted.]

Jager at 1107, n. 23.

Here there are no questions of fact to be decided. It is agreed that Mr. G did not apply before June 30, 1986 for his 1986 Permanent Fund Dividend. The only questions here are ones of law: whether Mr. G has a right to receive his 1986 Permanent Fund Dividend because other

statutory and constitutional provisions compel that conclusion. Therefore, the substantial evidence test is not applicable.

Likewise these are not questions involving agency expertise which would require the use of the rational basis test. In Earth Resources Co., v. State, Dept. of Rev., 665 P.2d 960 (1983), the Alaska Supreme Court discussed the distinction between the rational basis test and the substitution of judgment test. The rational basis test is a deferential standard "requir[ing] a reviewing court to consider factors of agency expertise, policy, and efficiency when reviewing discretionary decisions." Earth Resources at 964-965. On the other hand,

[t]he substitution of judgment standard is applied where the questions of law presented do not involve agency expertise and, thus, a court need not take the deferential stance embodied in the rational basis test. Kelly v. Zamarrello, 486 P.2d 906, 916 (Alaska 1971). The standard is appropriate where the knowledge and experience of the agency is of little guidance to the court or where the case concerns "statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience." Id. Application of this standard permits a reviewing court to substitute its own judgment for that of the agency's, even if the agency's decision had a reasonable basis in law. [Citation omitted.]

Earth Resources at 965. In the Earth Resources case the court found that a question for which the Department of Revenue relied completely on court decisions, rather than on agency-related activities must be reviewed under the substitution of judgment standard rather than the rational basis standard. See also Borkowski v. Snowden, 665 P.2d 22, 27 (1983).

The court has also stated that statutory construction issues "fall into the realm of special competency of the courts" and therefore require the application of the substitution of judgment standard. Madison v. Alaska Dept. of Fish and Game, 696 P.2d 168, 173 (Alaska 1985).

Again, here, the question is one of statutory construction of AS 43.23.055(4) and AS 18.80.255(3) as well as constitutional analysis of the actions of the Department of Revenue. Agency expertise does not enter into these questions. Therefore, the substitution of judgment standard of review is required to be used in review of these questions.

In looking at the regulations at issue, Borkowski v. Snowden, supra, supports the use of the substitution of judgment standard for these regulatory questions also. An earlier case, Kenai Pen. Fisherman's Co-op. Ass'n. v. State, 628 P.2d 897, 906 (1981), supports the use of the reasonable and not arbitrary standard. As will be seen in Mr. G's

argument, use of either of these standards to review the regulations in question will compel the same result.

VI. ARGUMENT

- A. The Department of Revenue has not fulfilled its statutory obligation under AS 43.23.055(4) to assist residents of the state who because of disability need assistance to establish eligibility and to apply for permanent fund dividends.

Mr. G . has a combination of disabilities which makes it difficult for him to handle adequately his own affairs. [R. at 38-42] It is well-established that Mr. G has difficulty functioning independently. In fact, the Department of Revenue deferred to Ms. Bonnie Darnell during the course of Mr. G 's hearing and had her speak for him. [R. at 18] He has been a resident of two different state-funded residential facilities (Full Circle Boarding Home and Hope Cottages) which require a threshold level of impairment. See AS 47.80.900(7)¹ and R. at 36. He also receives

¹ Under AS 47.80.900(7):

"person with a developmental disability"
means a person having a disability which

(A) is attributable to

(i) mental retardation...; and

(B) constitutes a substantial handicap to the person's ability to function normally in society...

disability benefits under the Social Security Act which also require a person to be functioning at a level where they cannot work independently.² Mr. G did not apply on time for his 1986 Permanent Fund Dividend because he was not able to apply on his own behalf and had no one who could apply for him.

The Alaska Legislature anticipated that people such as Mr. G would have difficulty in making application for Permanent Fund Dividends. In enacting the Permanent Fund legislation, they specifically provided for the Department of Revenue to assist people who would have difficulty in applying. AS 43.23.055(4). The Department of

AS 47.80.900(9) goes on to define "substantial handicap" as

a disability which prevents or substantially impedes the person's participating in and benefiting from the social, economic, educational, recreational, or other opportunities generally available to peers in the community who are not similarly handicapped.

² See 42 U.S.C. §§ 416(1)(1) and 1382c(3)(A):

An individual shall be considered to be disabled for purposes of this title if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months....

Revenue has not established any procedures which would assist people with mental disabilities in knowing they are to apply or assisting them with the application process.

The Department did establish regulations at 15 AAC 23.645 which allow an application for a Permanent Fund Dividend to be filed by someone other than the applicant under certain circumstances. This is the only accommodation which the Department has made to those the legislature had sought to assist. In other words, only those disabled people who have someone already looking after their interests are contemplated under the Departmental regulations. It is difficult to see how this meets the requirements of AS 43.23.055(4).

In the decision of the Department on this matter, the hearing officer relied heavily on the regulations of the Department at 15 AAC 23.645. [R. at 8-9] Nothing was said about the statutory requirement that the Department assist disabled people in applying for Permanent Fund Dividends.

AS 44.62.030 provides:

[N]o regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

In Kelly v. Zamarello, 486 P.2d 906 (1971), the Alaska Supreme Court dealt with this principle. They stated that first the court should look to:

whether the regulation is consistent with and reasonably necessary to carry out the provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature.

Id. at 911. They go on to require that the regulation must be "reasonable and not arbitrary." Id.

Here, the regulations do not consistently carry out the provisions of the statute requiring that the Department assist people with disabilities in establishing eligibility for Permanent Fund Dividends. This is contrary to the clear statutory mandate. Therefore, the regulations which were relied upon by the Department in denying Mr. G his 1986 Permanent Fund Dividend are arbitrary and invalid and should not be applied to deny him that benefit.

B. Mr. G was denied equal protection of the laws in violation of the Alaska and U.S. Constitutions.

AS 43.23.055(3) provides for the Department of Revenue to establish procedures for individuals to

apply for permanent fund dividends not received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual...

No such provision is made for those who because of disabilities are unable to apply on their own behalf. This is a denial of equal protection under the Alaska and U.S.

Constitutions. Alaska Const. Art I, § 1 and U.S. Const. amend. XIV, § 1.

The Alaska Supreme Court has not yet dealt with the issue of how the class of people with mental disabilities fits into the Alaska "uniform-balancing" test. This test:

place[s] a greater or lesser burden on the state to justify a classification depending on the importance of the individual rights involved.

Herrick's Aero-Auto-Agua Repair Service v. State, Dept. of Transportation, --P.2d-- (Op. No. 3309 at p. 8, April 29, 1988) (citing Alaska Pacific Assur. Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984)). "The minimum burden the state must meet is the rational basis test...." Id.

This rational basis test questions whether the classification is "reasonable and not arbitrary" and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation." [Citation omitted.] Under this test, we will not "hypothesize facts which will sustain otherwise questionable legislation."

Id. at 8 (citing Isakson v. Rickey, 550 P.2d 359 (Alaska 1976)). At the other end of the scale of scrutiny are those cases where fundamental rights and suspect categories are involved. In those cases, the burden upon the state becomes great to justify the classification.

The equal protection clause of the U.S. Constitution has been said to be "essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The same can be said of the equal protection clause of the Alaska Constitution.

In the Cleburne case, the U.S. Supreme Court declined to give heightened scrutiny to a zoning ordinance which discriminated against group homes for people with mental retardation. Id. at 441. The Court, in a lengthy discussion of mental retardation and the many legitimate forms which legislation affecting people with mental retardation takes, concluded that creating a new "quasi-suspect" class would not further the interests of people with mental retardation. Id. at 446. They were, however, quick to assert that the equal protection clause nonetheless protects the interests of people with mental retardation. Id. at 446-447.

In Mr. G 's case, we are faced with a different kind of equal protection question: can the State treat different categories of people who are unable to apply for Permanent Fund Dividends differently? If children are allowed to apply when their legal disability has been removed, it would seem that a person under an actual disability should

be able to apply for a Permanent Fund Dividend when they acquire the support to make that application possible.

Under other circumstances, childhood and disability are treated similarly by the law. For example, statutes of limitations are tolled during minority and incompetence. See AS 09.10.140. Contracts entered into by minors are voidable as are contracts entered into by a person who is incompetent. See Restatement (Second) of Contracts §§12, 14 and 15. While Mr. G has not been found to be incompetent by any court, the analogy is apt.³

Since there is no indication in the Permanent Fund Dividend Statute as to why people with disabilities were treated differently than minors, it is not up to Mr. G to speculate as to what reasons the legislature may have had. It is enough to show that he is similarly situated with all the minors who are able to later acquire Permanent Fund Dividends which were not applied for during their childhood. Therefore, he should be able to apply for and

³ There is no public agency in Alaska which files petitions for guardianship against people who may arguably need some protection. Thus, unless a disabled person has an interested family member or friend willing to go to court, the disabled person is on their own. This places legal incompetency to handle one's affairs in a strange position in Alaska--those who have supportive family and friends are the most likely to have a court-appointed guardian or conservator. People with no one continue to have no one to protect their interests.

receive a Permanent Fund Dividend check for 1986 now that he is in a position to be able to apply.

- C. The Alaska Department of Revenue has unlawfully discriminated against Mr. G in violation of AS 18.80.255.

Under AS 18.80.255(3):

It is unlawful for the state or any of its political subdivisions... to refuse or deny to a person any... state... funds, services, goods, facilities, advantages or privileges because of physical or mental disability.

By failing to accommodate Mr. G's disabilities, the Department of Revenue has discriminated against Mr. G.

This statute and its definition of physical and mental disability closely track the language of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. It has been recognized by the Alaska Supreme Court in analyzing other provisions of AS 18.80 that where the employment discrimination provisions of this law were modeled on federal law⁴, federal case law is relevant. Wondzell v. Alaska Wood Products, 601 P.2d 584, 585 (1979). In addition, the Alaska court has found that due to the Alaska legislature's strong statement of purpose (at AS 18.90.200) to eliminate

⁴ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

discrimination, the Alaska statute has more "teeth" than the federal anti-discrimination statutes. Wordzell, id.

Section 504 of the Rehabilitation Act of 1973 was intended to give meaningful access to federal programs to people with disabilities. See Cook, The Scope of the Right to Meaningful Access and the Defense of Uncue Burdens Under Disability Civil Rights Laws, 20 Loy. L.A. L.Rev. 1471, 1472-1479 (1987). It was recognized by Congress that it might be costly to accommodate the needs of people with disabilities. Id. at 1479.

While the Alaska State Commission for Human Rights has not yet promulgated final regulations which would shed some light on how the state will enforce these provisions of AS 18.80, it is clear that our legislature also intended to remediate some harms being done to people with disabilities. Coupled with AS 43.23.055, it is also apparent that the Alaska legislature was very concerned about the ability of Alaskans with disabilities to participate fully in the benefits of life in Alaska. The regulations promulgated by the Department of Revenue are in conflict with these statutory provisions in that they do not provide adequate accommodation for people with disabilities. They should not be enforced in a discriminatory manner by the Department of Revenue.

VII. CONCLUSION

Mr. G is entitled to his 1986 Permanent Fund Dividend. The Department of Revenue failed in its statutory obligation to assist people with disabilities in their application process. It is probable that Mr. G would have applied for his 1986 Dividend had there been a system in place to search out people who would have difficulty applying on their own. In addition, it is a violation of Mr. G's rights under the equal protection clauses of the U.S. and Alaska Constitutions to treat people with disabilities differently than minors are treated for purposes of applying for and receiving Permanent Fund Dividends. The State of Alaska should be required to have a system which treats all people similarly situated in a fair and equal manner. In addition, Mr. G's right to reasonable accommodation of his disability under AS 18.80.255(3) has been violated.

Appropriate relief in this case would allow Mr. G to receive his 1986 Permanent Fund Dividend since he meets all other requirements.

Respectfully submitted at Anchorage, Alaska this
20th day of July, 1988.

Rebecca E. Graham
Rebecca E. Graham
Attorney for Appellant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

E J G ,)
)
 Appellant.)
v.)
)
 HUGH MALONE, Commissioner)
 Department of Revenue,)
 State of Alaska, in his)
 official capacity.)
_____)

Case No. 3AN-88-5266 CI

APPELLEE'S BRIEF

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_____, 1988 in the
Superior Court of the
State of Alaska.

By: _____

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STATUTES AND REGULATIONS PRINCIPALLY RELIED ON

AS 18.80.255(3)

(3) to refuse or deny to a person any local, state, or federal funds, services, goods, facilities, advantages or privileges because of physical or mental disability.

AS 43.23.015(g)

(g) If an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may appeal that decision to the superior court in accordance with AS 44.62.560. An appeal under this section does not entitle the aggrieved individual to a trial de novo. The appeal shall be based on the record of the administrative proceeding from which appeal is taken and the scope of appeal is limited to matters contained in the record of the administrative proceeding.

AS 43.23.055

Duties of the department. The department shall

(1) annually pay permanent fund dividends from the dividend fund;

(2) adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for claiming a permanent fund dividend; the department shall set the time limit for applications for permanent fund dividends so that the number of eligible applicants is determined by October 1 of the year for which the dividend is declared and permanent fund dividends for a year are paid before April 30 of the year following that year;

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual; and

(4) assist residents of the state, particularly in rural areas, who because of language, disability, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

AS 44.62.560

Judicial review. (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes (1) the pleadings, (2) all notices and orders issued by the agency, (3) the proposed decision by a hearing officer, (4) the final decision, (5) a transcript of all testimony and proceedings, (6) the exhibits admitted or rejected, (7) the written evidence, and (8) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeal in civil matters shall be followed where this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

15 AAC 23.615(f)

(f) An individual who has reached majority, or who has become an emancipated minor, may apply to the department if (1) he or she was a child during the six-month period described in (a)(2) of this section, (2) a permanent fund dividend application was not filed on the individual's behalf or was not timely filed, and (3) the individual was eligible to receive a payment under AS 43.23.005 - 43.23.095. The department, in its discretion, will waive the time limit provided in 15 AAC 23.625 for that individual. A waiver of the time limit under this subsection will not extend beyond one year after the individual reaches majority or becomes an emancipated minor.

15 AAC 23.625(a)

Applications. (a) An application for a dividend payment under AS 43.23.005 - 43.23.095 must be filed before July 1 of the year of application on a form provided by the department. An application postmarked June 30 or earlier will be considered timely filed.

15 AAC 23.645

Application of Behalf of an Incompetent, Disabled, or Other Adult. (a) An application for a permanent fund dividend may be filed on behalf of an incompetent adult only by the incompetent adult's guardian or conservator appointed under AS 13.26 or other similar provision of law of this state or of another jurisdiction.

(b) An application for a permanent fund dividend may be filed on behalf of a disabled adult only by the adult's spouse, parent, legal guardian, or other authorized representative.

(c) For good cause shown, the following persons may file an application for a permanent fund dividend on behalf of an adult who is neither incompetent nor disabled; (1) the adult's legal guardian; or (2) the adult's spouse, parent, or other authorized representative having power of attorney.

(d) Evidence of the authority of the individual applying on behalf of an adult under this section must be attached to the application and the circumstances requiring the signature by someone other than the applicant must be clearly set out. The individual making application on behalf of another adult must certify to the facts underlying the adult's eligibility for a permanent fund dividend payment and must sign the application on behalf of that adult.

(e) An individual applying on behalf of another adult must comply with 15 AAC 23.525.

JURISDICTIONAL STATEMENT

This is an appeal from a final administrative decision of the Department of Revenue dated April 8, 1988. This court has jurisdiction over this appeal under AS 44.62.560 and Appellate Rule 601.

ISSUES ON APPEAL

1. Whether the issues raised by G in this appeal should not be considered because they are outside the scope of record of the administrative proceeding.
2. Whether the appropriate standard of review is "substantial evidence," "rational basis," or "reasonable and not arbitrary."
3. Whether the Department of Revenue has provided sufficient assistance to disabled applicants.
4. Whether the different treatment given to minors as compared to disabled persons satisfies the equal protection clause.
5. Whether there is sufficient evidence that the regulations of the Department of Revenue discriminate against disabled persons.

STATEMENT OF FACTS

This is an appeal filed on behalf of Mr. E J G (hereinafter "G ..") following the denial of his application for a permanent fund dividend for 1986. The application was denied by the Department of Revenue, Permanent Fund Division

(hereinafter "Department") because it was filed too late. The due date for the 1986 dividends was July 1, 1986, however, G filed his application on December 8, 1986, Record (hereinafter "R") 29, along with a document entitled "Request to Reapply or File Late," in which G claimed he was unable to file during the filing period due to circumstances beyond his control. R 30.

Following the initial denial of his late application and the filing of his initial appeal, G's application was informally reviewed by Jeanette Heib, PFD Specialist I, who again denied the application. R 31-33. The sole issue at the informal review was whether G provided sufficient evidence that his failure to timely file was due to circumstances beyond his control. R 33.

G appealed again, requesting a formal hearing. R 34. In connection with that appeal, G was informed that he should state the reason for his appeal and refer to facts and supporting law. R 35. G was granted a formal hearing on March 23, 1988 before Revenue Hearing Examiner Myron Klein. At the formal hearing which G attended, he was advised that all factual information and issues were to be presented at that hearing and that any appeal from the Hearing Examiner's decision would be based on the record created at that hearing. R 13, lines 11, 12; R 14, lines 3, 4.

At the formal administrative proceeding the issues raised by G were limited to residency (R 18, 11 24, 25; R 19, 11 1, 2; R 25, 11 20-22), G's noncomprehension of the

significance of dates (R 19, 1 4), the failure of Hope Cottages, a care facility for developmentally disabled persons, to file G 's application in a timely manner (R 19, 11 5-8) and G 's failure to make a timely application not being his fault (R 19, 11 9-16). The Hearing Examiner then issued a written decision which denied G 's appeal, (R 5-9) containing the ruling that, "A late filed application may not be paid even if the reason for late filing is that a mentally retarded applicant relied on another who failed to make the application."

This superior court appeal was then filed against Hugh Malone, Commissioner of the Department of Revenue, in his official capacity. (For the purposes of this Appellee's Brief, reference to the Department of Revenue or the Department refers to the named Appellee, Hugh Malone, in his official capacity.) In this appeal G . raises claims that the Department has not complied with the mandate of AS 43.23.055(4) requiring the Department to provide assistance to disabled persons, that G was denied equal protection in view of the different treatment provided to minors as compared with disabled persons with regard to late filed applications and that the Department has discriminated against G . under AS 18.80.255(3) by denying him a dividend on the basis of his disability.

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ARGUMENT

I. ALL ISSUES RAISED BY G. . . IN THIS APPEAL SHOULD NOT BE CONSIDERED AS THEY ARE OUTSIDE THE SCOPE OF THE ADMINISTRATIVE PROCEEDING

A. The Issues Raised By G Do Not Comply With AS 43.23.015(g)

In this superior court appeal, G . . . does not raise any of the issues which he raised in the earlier administrative proceeding. All the issues he raises for this court's review are raised for the first time in this case. This is in violation of AS 43.23.015(g), which provides as follows:

If an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may appeal that decision to the superior court in accordance with AS 44.62.560. An appeal under this section does not entitle the aggrieved individual to a trial de novo. The appeal shall be based on the record of the administrative proceeding from which appeal is taken and the scope of appeal is limited to matters contained in the record of the administrative proceeding.

(Emphasis added.) By virtue of § 015(g), the scope of G 's appeal is therefore required to be limited to those matters contained in the record of the administrative proceeding from which he appeals.

Section .015(g) cannot state the point more clearly. As the administrative proceeding raised only issues of residency and excuses regarding G 's failure to file, this appeal can only be limited to those issues. However, in this appeal G raises issues alleging violation of the equal protection clause and AS 18.80.255(3) and the Department's noncompliance with AS

43.23.055(4). As G did not raise these issues at the administrative proceeding, they should not be considered by this court.

B. G Should Not Raise New Issues On Appeal

As a general rule, parties cannot raise new issues on appeal in order to secure a reversal of a lower court's determination. Wickwire v. McFadden, 633 P.2d 278, 281, n.6 (Alaska 1981); Von Brimer v. Whirlpool Corporation, 536 F.2d 838, 848 (9th Cir. 1976); O'Neill Investigation, Inc. v. Illinois Employer's Insurance of Wausau, 636 P.2d 1170, 1175, n.7 (Alaska 1981); Williams v. Alyeska Pipeline Service Co., 650 P.2d 343, 351 (Alaska 1982). Furthermore, the record on appeal in this case contains no reference that G raised at the administrative proceeding the issues he has now raised in this appeal. Hence, this court may presume they were not made, Fendler v. Phoenix Newspapers, Inc., 636 P.2d 1256, 1260, N.2 (Ariz. App. 1981), and G may be considered to have waived his right to address those issues before this court. Ryeful v. Ryeful, 650 P.2d 369, 374, 375, n.16 (Alaska 1982).

While an appellate court will not consider an issue unless it has been argued in the trial court and properly raised on appeal, according to Vest v. First National Bank of Fairbanks, 659 P.2d 1233 (Alaska 1983), an appellate court may consider such an issue if it amounts to plain error as set forth in Alaska Rule of Criminal Procedure 47(b) or if it involves a question of law

that is critical to a proper and just decision and the parties have had the opportunity to brief the issue. Vest, at p. 1234, n.2; See, Buford v. State, 515 P.2d 382, 383 (Alaska 1973).

The first alternative described by the Vest court is inapplicable to our case because Alaska Rules of Criminal Procedure do not apply. The second alternative is also inapplicable because G's claims have been raised in such a factual vacuum that this court will be unable to make a reasoned decision on those claims even if it received further briefing from the parties on the status of the law. In light of the incomplete record in this case, this court should therefore not consider those issues.

Additionally, a case may not be tried on one theory of law in the trial court and upon another theory on appeal. An appellate court is therefore not obliged to review theories other than those which were presented to the trial court. O'Neill Investigation, Inc. at p. 1175, n.7, and Plancich v. State, 693 P.2d 855, 857, n.1 (Alaska 1985); Crunk v. State Farm Fire and Casualty Company, 686 P.2d 1132 (Wash. App. 1984); Southern Pacific Co. v. Loden, 508 P.2d 347, 351 (Ariz. App. 1973).

As is evident from the record on appeal, G's arguments at the administrative level were that as a life-long resident of the state he considered he was entitled to a dividend and that the untimely filing was not his fault. After failing on those issues G has now taken a different tack and seeks to

prevail on new arguments he has raised. This court should not consider them.

The source of G's error may be that he received inadequate representation at the agency level and received the benefit of a law trained representative only in this latest appeal. However, that does not change the fact that AS 43.23-.015(g) and other well-established case law controls and requires this court to disregard the new issues.

II. APPROPRIATE STANDARDS OF REVIEW: "SUBSTANTIAL EVIDENCE," "RATIONAL BASIS," AND "REASONABLE AND NOT ARBITRARY"

The Appellee agrees that the "substantial evidence" standard should be applied to issues of fact, that the "rational basis" standard should be applied to issues of law concerning agency expertise, policy and efficiency, that the "reasonable and not arbitrary" standard should be applied to a review of administrative regulations, and that the "substitution of judgment" standard should be applied to issues of law where no agency expertise is involved. Jager v. State, 537 P.2 1100, 1107, n.23; Earth Resources Company v. State, 665 P.2nd 960, 964, 965 (Alaska 1983). However, had G had raised the arguments he now raises in this appeal in the proper manner, that is, by first raising them in the administrative proceeding, the record at hand would have most likely contained evidence and argument against which these standards of review could have been applied by this court. Thus, while these standards should be applied, they cannot be applied by reason of the paucity of the record on appeal.

For clarity of illustration, the various issues of fact, issues of agency expertise and issues pertaining to the reasonableness of the Department's regulations involved in this case are discussed in the following subheadings: III, IV, and V.

III. THE DEPARTMENT PROVIDES SUFFICIENT ASSISTANCE TO DISABLED APPLICANTS.

G raises for the first time in this case the claim that the Department has not complied with AS 43.23.055(4), which states as follows:

The Department shall
... (4) assist residents of the state, particularly in rural areas, who because of language, disability, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

G's claim concerning subsection .055(4) thus raises questions as to what the Department has done to follow the legislative directive, that is, what facts the Department has considered, what its experiences have been, what assistance it offers and what its policy is on the type of assistance it offers. Because G did not raise his claim concerning subsection .055(4) at the administrative proceeding, these questions were not addressed at that proceeding.

In view of the factual inquiries which must be made to make a reasoned decision as to the Department's compliance with Subsection .055(4), G is incorrect when he asserts at page 3, ¶ 3 of the Brief of Appellant (hereinafter "Brief") that, "Here there are no questions of fact to be decided." Similarly, G

lately states at page 8, ¶ 3 of his Brief that, "Nothing was said [at the administrative proceeding] about the statutory requirement that the Department assist disabled in applying for Permanent Fund Dividends." The reason nothing was said should have been obvious to G : he did not raise it as an issue!

G also asserts that 15 AAC 23.645, which permits an application of an incompetent or a disabled person to be filed by another person, does not satisfy AS 43.23.055(4). Brief, p.8 ¶2. However, G 's assertion that § 645 is insufficient raises other questions of fact: whether the Department could reasonably be expected to provide more assistance, whether more assistance is need by incompetent and disabled persons, how the Department can be expected to identify disabled persons if they don't make themselves known to the Department and the extent to which other care providing institutions should be held responsible to provide needed assistance to potential applicants. In conducting an inquiry into these issues this court will also need to consider the Department's expertise, experience, and the policies it has formulated and these issues should be addressed in the record for this court to be able to make a reasoned decision.

Had the Department addressed these issues at the administrative proceeding, it would have been able to provide evidence that its regulations permit a person to file on behalf of a disabled applicant, that it maintains three offices in the state manned by staff who are instructed to assist applicants, to answer their questions, to provide assistance over the telephone

if the applicant is unable to travel to one of the Department's offices, to sign as witnesses if the applicant cannot sign his name but can only draw an "X", and that the Department is prepared to send its assistants to various places in the state to provide personal assistance to applicants who have no other practical means of obtaining such assistance.

G's assertions regarding AS 43.23.055(4) and .645 require the application of the "substantial evidence" standard to the extent questions of fact are to be reviewed and the "reasonable basis" standard to the extent the Department's policies and decisions regarding assistance to incompetent and disabled persons are to be reviewed. Unfortunately, this court will be unable to apply either of these standards of review and make a reasoned decision because the record in this case is completely inadequate.

IV. THE DIFFERENT TREATMENT GIVEN TO MINORS AS COMPARED TO DISABLED PERSONS SATISFIES THE EQUAL PROTECTION CLAUSE

Under AS 43.23.055(2),

The Department shall set the time limits for applications for permanent fund dividends so that the number of eligible applicants is determined by October 1 of the year for which the dividend is declared and permanent fund dividends for a year are paid before April 30 of the year following that year;

The deadline for dividend applications is described in 15 AAC 23.625(a) as "July 1 of the year of application." One exception to that rule is mandated, however, by AS 43.23.055(3), which states as follows:

The department shall

... (3) adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual;

Pursuant to this directive, the Department enacted 15 AAC 23.615(f), which provides as follows:

An individual who has reached majority, or who has become an emancipated minor, may apply to the department if (1) he or she was a child during the six-month period described in (a)(2) of this section, (2) a permanent fund dividend application was not filed on the individual's behalf or was not timely filed, and (3) the individual was eligible to receive a payment under AS 43.23.005-43.23.095. The department, in its discretion, will waive the time limit provided in 15 AAC 23.625 for that individual. A waiver of the time limit under this subsection will not extend beyond one year after the individual reaches majority or becomes an emancipated minor.

(Emphasis added.) G again raises for the first time in this case the claim that requiring disabled persons to comply with the deadline in § 625(a) while providing minors an exception to that deadline violates the equal protection clause of the United States and Alaska Constitutions. Brief at p.9. To determine whether to apply the "reasonable basis" or the "substitution of judgment" standard of review to this claim, it is necessary to determine initially whether the issue involves agency expertise or is purely a question of law.

An analysis of the applicable statutes and regulations leads to the conclusion that the determination to provide

different treatment to minors as compared to disabled persons was a decision of the Department, thus it is an issue involving agency expertise. The relevant provisions of AS 43.23.055 require only that a deadline for claiming dividends be set, that disabled persons be assisted and that minors be given an opportunity, upon their emancipation or upon reaching majority, to file for dividends which were not filed for earlier on their behalf. Section .055 does not expressly require that minors be treated differently from disabled persons. In implementing the directive of subsection .055(4) the Department could have, for example, assisted disabled persons by providing them with a relaxation of the filing deadline under certain circumstances. However, the Department chose not to do that. That decision is therefore assumed to be the product of the Department's experience, expertise and policy making. Because the issue involves agency expertise, it is appropriate to use the "reasonable basis" rather than the "substitution of judgment" standard of review in judging the validity of the different treatment given to these two types of applicants.

The Department agrees with G that the burden the Department must bear to justify the constitutionality of the different treatment is satisfaction of the "rational basis" test. Brief, p.10, ¶ 1. The Department also agrees with G that for equal protection purposes, mentally retarded persons do not represent a suspect class. Brief, p.22, ¶ 2; City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442, 87 L. Ed. 2d 313, 321,

105 S. Ct. 3249 (1985). Therefore, all the Department needs to show is that its regulations meet the "rational basis" test, City of Cleburne, 473 U.S. at 448, 87 L. Ed. 2d at 325, that is, that the distinction created is reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation. Herrick's Aero-Auto-Aqua Repair Service v. State, --P.2d--, (Op. 3309 at p. 8, April 29, 1988).

Because this constitutional issue was not raised by G at the administrative proceeding, the record on appeal contains no reference to any inquiry as to the reasonableness of the Department's decision to treat minors differently than disabled persons. Because the record is totally inadequate, this court cannot make a reasoned decision on the constitutional issue. This court should therefore not consider it.

Furthermore, in compliance with Herrick's Aero-Auto-Aqua Repair Service dicta at p. 8, this court should not hypothesize facts in order to analyze the Department's compliance with this legislation. In this connection, G states, albeit incorrectly, "...it is not up to Mr. G to speculate as to what reasons the legislature may have had [as to why people with disabilities are treated differently than minors]." Brief, p. 12, ¶ 3. Nonetheless, while one should not speculate on such reasoning, in order to properly review the constitutionality of the Department's regulation, it is

nonetheless necessary to consider the reasons for the different treatment in order to determine whether they are reasonable, etc.

Had the constitutional issue been raised at the administrative proceeding, the Department would have presented testimony that it had provided as much assistance to disabled persons as it could have without giving impermissible preferential treatment to disabled persons. The Department would have also presented evidence in this connection that if a disabled person could not meet the present deadline, giving them later deadlines would not guarantee a solution. Ideally, no deadline may be appropriate for a disabled person. The Department would then have taken the position that if it were to enact a regulation to that effect, it would probably be found unconstitutional.

In his Brief G refers to the different treatment given to minors by analogizing to various provisions in the Alaska Statutes which reflect the legal incapacities of minors. Brief at p. 12, ¶ 2. However, the different treatment given to minors as compared to disabled persons in the case at hand is more than a manifestation of the general rule that minors are not legally responsible for their civil actions whereas adults are legally responsible. The different treatment exists not because disabled persons are assumed to be without the legal incapacities of a minor, but rather, because to do more for disabled persons than what is already being done will amount to giving to them impermissible preferential treatment. The Department is also concerned with its practical limitation on providing more

assistance to disabled persons, the most immediate of which is that a disabled person cannot be assisted unless the Department knows that that person needs assistance. Furthermore, as a policy matter, the Department considers a disabled person's care taking institution to be in the best position to provide assistance and that if that institution fails to submit an application, the disabled person has the ability to seek legal recourse against it. In light of these concerns, the Department's decision to provide different treatment to these two types of applicants meets the "reasonable basis" standard.

V. THERE IS NO EVIDENCE THAT THE DEPARTMENT'S REGULATIONS DISCRIMINATE AGAINST DISABLED PERSONS

G also raises for the first time in this case the claim that by denying him the dividend for 1986, the Department violated AS 18.80.255(3), which provides as follows:

It is unlawful for the state or any of its political subdivisions
... (3) to refuse or deny to a person any local, state, or federal funds, services, goods, facilities, advantages or privileges because of physical or mental disability.

(Emphasis added.) However, to the extent the record in this case addresses the reason for the denial of the application, it is clear the denial was for the reason that the application was untimely. In this light, § 255(3) does not support G 's claim for that subsection applies only to denials because of mental disability, thus referring to a direct connection between the disability and the denial. However, to the extent that G

intends to take a broader view of § 255(3), the result would still be the same.

G appears to argue that the department's regulations fail to provide "adequate accommodations" to persons with disabilities. Brief, p. 14, ¶ 3. Unfortunately, G fails to provide any evidence that this is so in the case at hand, apart from providing the bare facts that he needed assistance to file his application and that his assistant filed the application late. G also fails to prove that the Department has a duty to personally provide an assistant to him, even when he does not let the Department know that he needs assistance or that the Department knew or should have known that he needed assistance.

Finally, G states in his brief at p. 15, ¶ 1, that, "It is probable that Mr. G would have applied for his 1986 dividend had there been a system in place to search out people who would have difficulty applying on their own." However, G fails to refer to any facts in the record which support such a conclusion. Furthermore, to the Department's knowledge no such facts exist. G's statement that but for the Department's inaction he probably would have filed a timely application is therefore pure conjecture. In view of G's failure to provide evidence sufficient to support a finding of a violation of § 255(3) this court cannot make a reasoned decision.

Had the Department been given notice of this issue in the administrative proceeding, it would have produced evidence that several hundred dividends have been obtained by disabled or

incompetent persons, that in the history of the Department it has received only two other appeals of G ' 's type, that according to its experience, a failure of a disabled person to obtain assistance to file an applications is almost nonexistent and that if the Department had received a request of assistance from G or from G 's guardian, G would most certainly have received assistance.

G 's assertions of discrimination also raise a number of policy questions which the Department should have had an opportunity to address at the administrative proceeding. For example, the extent to which the Department should be required to provide assistance to disabled persons; the mechanism by which the Department is expected to know when a disabled person needs assistance; the extent to which the Department should be required to jeopardize its fiscal efficiency by doing away with filing deadlines for disabled persons; and the extent to which disabled persons are expected to pursue other remedies available to them, such as seeking legal recourse against a negligent spouse, parent, guardian, conservator, or other authorized personal representative who have through their own negligence failed to submit a timely application.

CONCLUSION

In exercising his various rights of appeal G has abandoned in this latest appeal, all of his previous theories of the case and replaced them with new theories. This change of

tactics at this stage of the litigation leaves this court with a completely inadequate record on appeal. AS 43.23.015(g) specifically prohibits G from expanding the scope of this appeal beyond the matters addressed in the administrative proceeding. Had G raised these issues at the administrative proceeding the Department would have had the opportunity to fully address them and to develop a complete record for this court. However, on the basis of the facts in the record before this court, a reasoned decision cannot be made on any of the issues raised by G .

For the reasons stated herein, the Department of Revenue respectfully requests this court to not consider any of the issues raised by G in this appeal and to dismiss the appeal.

DATED this 12th day of August, 1980, at Anchorage, Alaska.

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: *Lawrence C. Delay*
Lawrence C. Delay
Assistant Attorney General

nderstand that these penalties are in penalties imposed.

ture of individual, t, guardian, or other rized representative)

this section or as may be provided by ment, an individual must personally it fund dividends, including the certi- nder (b) of this section.

ication of residency of an unemanci- f age or of an incompetent individual l's parent, legal guardian, or other

permanent fund dividend on behalf of shall hold the dividend in trust for rust under this subsection shall be 1 accordance with AS 37.10.070.

individual may not maintain a claim employee of the state based on the rdian, or authorized representative state managed or disposed of perma- behalf of the minor or incompetent

ed by a decision of the department bility for a permanent fund dividend claim a permanent fund dividend on lay appeal that decision to the supe- S 44.62.560. An appeal under this ved individual to a trial de novo. The ord of the administrative proceeding he scope of appeal is limited to mat- the administrative proceeding.

nt provisions of AS 43.23.035 apply rmanent fund dividend on behalf of am § 2 ch 159 SLA 1988; am § 4 ch

permanent fund dividends. The commis- sioner may require an individual to pro- vide proof of eligibility, and the commis- sioner may use other information avail- able from other state departments or agencies to determine the eligibility of an individual.

"(b) The department shall prescribe and furnish an application form for claiming a permanent fund dividend. The application must contain a statement of eligibility

§ 43.23.025

and a certification of residency in substan- tially the following form:

I certify that
(1) I am a state resident on the date of this application and I have been a state resident for at least six months immediately preceding the date of this applica- tion, or

(2) (name), the individual on whose behalf I am applying, is a state resident and has been a state resident for at least six months immediately preceding the date of this application.

I understand that a false claim of resi- dency to obtain a permanent fund divi- dend for myself or for another is a crim- inal offense and that if convicted I will for- feit future permanent fund dividends and that I will lose or must repay all perma- nent fund dividends that have been cred- ited or paid to me, and any accrued inter- est in my annuity account. I understand that this penalty is in addition to any criminal penalties imposed.

(signature of individual, parent, guardian, or other authorized repre- sentative)

"(e) If a public agency claims a dividend on behalf of an individual under this sec- tion, the public agency shall elect 100 per- cent cash under AS 43.23.005(d) and hold the dividend in trust for the individual. Money held in trust under this subsection shall be invested by the commissioner in accordance with AS 37.10.070.

Sec. 43.23.025. Amount of dividend. (a) By October 1 of each year the commissioner shall give public notice of the value of each permanent fund dividend for that year. The public notice shall contain a statement disclosing the amount by which each individual dividend has been reduced in order to pay the costs of administering the pro- gram and the hold harmless provisions of AS 43.23.075. The commis- sioner shall also include the statement on the stub attached to each individual dividend check. The commissioner shall determine the value of a permanent fund dividend by

(1) determining the total amount available for dividend payments, which equals

(A) the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 43.23.045(b) during the current year;

(B) plus the unexpended and unobligated balances of prior fiscal year appropriations that lapse into the dividend fund under AS 43.23.045(d);

(C) less the amount necessary to pay dividends from the dividend fund in the current year under AS 43.23.055(3);

"(f) A minor or an incompetent individ- ual may not maintain a claim against the state or an officer or employee of the state based either on the manner in which the parent, guardian, or authorized represen- tative other than a public agency of the state managed or disposed of permanent fund dividends received on behalf of the minor or incompetent, or an election made or not made on that individual's behalf under AS 43.23.005(d).

"(i) The permanent fund dividend appli- cation form shall be prepared to allow an applicant, other than a person who is ex- empt under AS 47.45.015(b), to elect to receive the dividend either in cash or as an annuity credit."

Cross references. — For voluntary contributions to Alaska Winter Olympics account, see AS 05.35.100.

Effect of amendments. — The 1988 amendment, effective January 1, 1989, re- wrote the statement of eligibility and cer- tification of residency in subsection (b) to the extent that a detailed comparison is impracticable.

The 1989 amendment, effective Janu- ary 1, 1990, substituted "24 months" for "six months" in the first two paragraphs of the form in subsection (b).

Editor's notes. — Until January 1, 1990, the first two paragraphs in the form in subsection (b) refer to a six-month rather than 24-month residency period.

Item 4

(D) less the amount necessary to pay dividends from the dividend fund due to eligible applicants who, as determined by the department, filed for a previous year's dividend by the filing deadline but who were not included in a previous year's dividend computation;

(2) determining the number of individuals eligible to receive a dividend payment for the current year; and

(3) dividing the amount determined under (1) of this section by the amount determined under (2) of this section.

(b) For the purpose of calculating the amount of a permanent fund dividend under (a) of this section, an individual who is ineligible to receive a dividend under AS 43.23.005(d) is counted as an eligible individual whether or not the individual has applied for the dividend. (§ 1 ch 102 SLA 1982; am § 1 ch 55 SLA 1983; am § 2 ch 43 SLA 1984; am § 2 ch 57 SLA 1987; am § 2 ch 54 SLA 1988)

Effect of amendments. — The 1984 amendment substituted "October" for "December" in the first sentence in the introductory paragraph.

The 1987 amendment, added the second and third sentences in the introductory language, in paragraph (1) inserted "the total amount available for dividend payments, which equals" following "determining," designated some of the existing language as subparagraph (A), and added

subparagraphs (B)-(D), and in paragraph (3) substituted "under" for "in" in two places.

The 1988 amendment, effective May 26, 1988, added subsection (b).

Editor's notes. — Section 4, ch. 54, SLA 1988 provides that the amendments made to this section by ch. 54, SLA 1988 apply "only to eligibility for permanent fund dividends for years after 1988."

NOTES TO DECISIONS

Stated in *Alaska Oil Co. v. Alaska*, 45 Bankr. 358 (D. Alaska 1985).

Sec. 43.23.035. Penalties and enforcement. (a) In addition to any criminal penalties imposed by state law, if an individual is convicted of a crime in connection with a false statement made in a certification required under AS 43.23.015, and the conviction is not reversed, that individual forfeits all permanent fund dividends paid and is not eligible for a future permanent fund dividend.

(b) If the commissioner determines that a permanent fund dividend should not have been claimed by or paid to an individual, the commissioner may use all collection procedures or remedies available for collection of taxes under this title to recover the payment of a permanent fund dividend that was improperly made. A notice of an improperly paid dividend must be sent to the individual within 10 years after the improper payment. If notice is not sent within the 10-year period, proceedings may not be commenced in court for recovery of the improper payment.

(c) An individual who, in claiming a permanent fund dividend, or an individual who, in certifying another person's eligibility, wilfully misrepresents, exercises gross negligence, or recklessly disregards a

matter to a five day may be 102 SL

Revised ch. 99, Section 43.23.015, effective May 26, 1988, amended AS 43.23.015, effective May 26, 1988, to provide that the amendments apply "only to eligibility for permanent fund dividends for years after 1988."

"(b) If that a case claimed by commission procedures or tion of tax

Sec. 4 lished as shall be the comr

(b) No commissi income o ending or However. Amerada District) Alaska pe to the div pal of th

(c) [Re] (d) Unl pended ar chapter l: which the the amou

STATE OF ALASKA

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

Item 5
STEVE COWPER, GOVERNOR

P.O. BOX 5
JUNEAU, ALASKA 99811-0400
PHONE: (907) 465-2300
TELEFAX: (907) 465-2389

April 2, 1990

The Honorable Bill Hudson
Alaska House of Representatives
P.O. Box V
Court, Room 605
Juneau, Alaska 99811

Dear Representative Hudson:

Your bill, HB 380 - "An Act relating to Permanent Fund Dividends for Incompetent Individuals ...", is scheduled for hearing in House State Affairs on April 3. Essentially this is a good piece of legislation. It seeks to address a fundamental inequity in the administration of the PFD program. With the recent adoption of 15 AAC 23.135(e), however, the Department believes this legislation to be unnecessary. Like yourself, the Department recently came to the conclusion that certain Alaskans, those loosely defined as "disabled" under 15 AAC 23.990(6), were unfairly being excluded from the program due to overly restrictive guidelines. Through no fault of their own—they were simply unable to complete the application—some were not completing or filing their application in time to meet the filing deadline. The recent adoption of 15 AAC 23.135(e) should adequately address this problem:

15 AAC 23.135(e) If the department does not have a timely filed application on file for an individual, that individual or an authorized representative may submit an application for a prior year dividend, if the individual was disabled as defined in 15 AAC 23.990(6) during the application period.

I appreciate your efforts (HB 380) in bringing both public and legislative attention to this issue. With the new regulation in place, the department will immediately undertake steps to rectify this very unfortunate situation.

Sincerely,

Clifford Cook for
Hugh Malone
Commissioner

HM:RW:sp

90-75

cc: All Members of House State Affairs Committee

Register

1990

REVENUE

15 AAC 23.135

gible to receive a permanent fund dividend. (Eff. / / ,
Register)

Authority: AS 43.23.015

AS 43.23.055

15 AAC 23.135. ELIGIBILITY FOR A PRIOR YEAR DIVIDEND FOR
1990 AND SUBSEQUENT YEARS. (a) An individual who has reached
majority, or who has become an emancipated minor, may apply to
the department for a prior year dividend if

(1) the individual had not reached majority or become
an emancipated minor ~~prior to~~ ^{before} July 1 of the dividend year for
which the individual is applying;

(2) a complete permanent fund dividend application was
not filed by an eligible sponsor on the individual's behalf, was
not timely filed, or, solely as a result of competing applications
being filed, ~~was~~ ^{not} paid; and
^

(3) the individual would have qualified as a resident, as described in AS 43.23.095(7).

(b) An individual who qualifies under (a) of this section must file an application within one year after the individual reaches majority or becomes an emancipated minor, whichever is earlier.

(c) Except as provided in (e) of this section, ⁱif the department does not have a timely filed application on file, in order to be eligible to receive a dividend, the applicant must submit, before July 1 of the year following the dividend year, a request to reapply and one of the following forms of evidence that an application was timely filed with the department:

(1) a mailing receipt;

(2) a delivery receipt; or

(3) a notarized affidavit in which the applicant or applicant's sponsor states, under penalty of unsworn falsification, that the application was timely filed^f and

(A) an individual states, under penalty of unsworn falsification, that the individual witnessed the filing; or

(B) one of the individuals who signed the residency verification portion of the timely filed application states, under penalty of unsworn falsification, that the individual signed the residency verification before the application deadline.

(d) If an applicant files, under (c) of this section, a request to reapply along with the required supporting evidence by September 15 of the dividend year and is determined to be eligible, the department will pay the applicant from that year's dividend distribution. If an applicant files, under (c) of this section, a request to reapply along with supporting evidence after September 15 of the dividend year but before the July 1 immediately following the dividend year and is determined to be eligible, the department will pay the applicant from that year's dividend distribution if money is available; if money is not available, then the applicant will be paid from the subsequent year's dividend distribution.

(e) If the department does not have a timely filed application on file for an individual, that individual or an authorized representative may submit an application for a prior year dividend, if the individual was disabled, as defined in 15 AAC 23.990(6), during the application period. (Eff. / / , Register)

Authority: AS 43.23.015

AS 43.23.055

15 AAC 23.145. APPLICATIONS GENERALLY FOR 1990 AND SUBSEQUENT YEARS. (a) An individual may apply for a permanent fund dividend after March 31 but before July 1 of the dividend year on a form provided by the department. An application postmarked during that period is considered timely filed.

(b) Except as provided in AS 43.23.015(d), 15 AAC 23.155, and 15 AAC 23.165, an individual applying for a ^{permanent fund} dividend ~~payment~~ must personally sign the certification of residency and eligibility contained on the application form.

15 AAC 23.990. DEFINITIONS. In this chapter, unless otherwise indicated,

- (1) "abode" means one's home or place of dwelling;
- (2) "adult" means an individual who has reached 18 years of age, which is the age of majority under AS 25.20.010, or who is under 18 years of age but because of marriage has reached the age of majority under AS 25.20.020;
- (3) "authorized representative" means an adult who has a sufficiently significant relationship with a child or another adult that the department is satisfied that the person is applying for the permanent fund dividend payment for the benefit of the child or the adult; "authorized representative" includes an official of a public agency or a private institution;
- (4) "child" means an individual who has not reached the age of majority under AS 25.20.010 or 25.20.020;
- (5) "department" means the Department of Revenue;
- (6) "disabled" means physically or mentally unable to complete and sign an application, due to a visual handicap, serious emotional disturbance, orthopedic or other health impairment, or due to a developmental disability that is attributable to mental retardation, cerebral palsy, epilepsy, or autism; "disabled" does not mean "incompetent";
- (7) "dividend year" means the calendar year in which the dividend is declared;
- (8) "emancipated minor" means an individual under the age of 18 years who has been declared emancipated by the superior court of this state under AS 09.55.590, or by a court of another jurisdiction under procedures granting the individual the equivalent status;
- (9) "individual" means a natural person;
- (10) "legal guardian" means a guardian or conservator appointed by the court under AS 13.26.035, 13.26.045, 13.26.095, 13.26.110, 13.26.112, 13.26.210, or similar provisions of law of this state or another jurisdiction;
- (11) "month" means a calendar month. (Eff. 4/1/89, Register 109)

Authority: AS 43.23.015
AS 43.23.055
AS 43.23.095



Residential and Employment Alternatives in the Community for the Handicapped
P. O. Box 34197 • Juneau, Alaska 99803
Phone: (907) 789-7673

January 11, 1990

The Honorable Bill Hudson
House of Representatives
Pouch V
Juneau, AK 99811

Dear Representative Hudson:

On behalf of Residential and Employment Alternatives in the Community for the Handicapped (REACH, Inc.) we offer support to your legislative efforts toward allowing the Permanent Fund Dividend application process to be sensitive to the special needs of disabled Alaskans.

As an agency, this is an issue of concern. We have several individuals who did not receive dividends. Even though they are certainly eligible, they are incapable of filling out the forms on their own. The system fails to take this type of situation into account. These individuals are penalized as a result, leading to further dependence on others to complete the process on their behalf.

I believe the state owes Alaskans suffering disabilities the protection from the existing Permanent Fund Dividend application process. Many Alaskans are at the mercy of others to file on their behalf and this is the "risk" factor that should be evaluated for removal, if possible.

If I can be of further assistance or support to you regarding this issue, please feel free to call on me anytime.

With regards,

Rod Moline

Rod Moline
Executive Director

RM/lc



Item 7



ADVOCACY SERVICES OF ALASKA

615 East 82nd, Suite 101
Anchorage, AK 99518
(907) 344-1002 TDD
Toll Free 800-478-1234
Fax (907) 349-1002

230 South Franklin
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(907) 586-1627 TDD
Fax (907) 586-1066

250 Cushman, Suite 3H
Fairbanks, AK 99701
(907) 456-1070 TDD
Fax (907) 456-1080

January 18, 1990

Representative Bill Hudson
P.O. Box V
Juneau, AK 99811

Attn: Landa

Re: Permanent fund dividend checks for people
with disabilities

Dear Representative Hudson:

I spoke today with Rod Moline of REACH in Juneau about the issue of people with developmental disabilities who miss filing deadlines for requesting their permanent fund dividends. He called me because he was aware of a case I recently settled with Department of Revenue. He stated that your office is interested in introducing some legislation to deal with this problem.

I have enclosed a copy of the briefs in the court appeal that I brought on behalf of a man with mental retardation. Basically the facts and issues are set out in the brief of appellant. After this was filed, the court remanded the case back to the Department of Revenue for a hearing to get more facts.

We never had a hearing on any of the issues because the State settled with my client and gave him his 1986 Permanent Fund Dividend. Subsequently the Department also settled with a client of this agency who has a diagnosis of mental illness and had also not applied for a PFD.

I have removed the name of my client to protect his dignity although this case is a public record.

I would be happy to provide any more information about this case or anything else that might be helpful to bring about a statutory resolution to this. I do not think that the current policy of simply settling with those claimants who appeal will be fair to those who have no way of knowing that this is available.

Sincerely,

Rebecca E. Graham

Rebecca E. Graham
Staff Attorney