

HB

2

Memorandum Re: HALE V. STATE OF ALASKA,
DEPARTMENT OF REVENUE, PERMANENT FUND
DIVISION, 3 AN 95-1076 CI

1. Permanent Fund Division denied her 1994 Application for Permanent Fund Dividend.
2. Mark Handley, Hearing Examiner for Department of Revenue, on
3. November 29, 1995, ruled that " the Division decision that Joan H. Hale is not not eligible for a 1994 Permanent Fund Dividend will stand."
4. Superior Court Judge Shortell ruled in the case December 3, 1996:
 - a. The question is one of law and the proper standard of review is the Substitution of Independent Judgment Test.
 - b. The issue in this case does not fall within the ZEILER decision by collateral estoppel because in ZEILER spouses at issue were non-residents; in HALE, both Hale and her spouse are residents.
 - c. The State incorrectly interpreted and applied ZEILER:
 - 1) In HALE, both Hale and her spouse were residents when they left the State.
 - 2) 15 AAC 23.163©(15) does not require a finding of ineligibility based solely on the residency of the spouse; rather, the regulation retains Hale's eligibility and leaves the State free to evaluate her residency and eligibility based on all of the evidence in the record.
 - d. Collateral estoppel did not require the State to deny Hale's PFD application. Further more, ZEILER did not invalidate the regulation as it applies to Hale. Hale's scenario fits squarely within the circumstances envisioned by ZEILER when it found that it was reasonable to allow residents to "piggyback" onto the allowable absence of a resident spouse because the spouse's residency is factor tending to show a likelihood that the applicant intends to return to the
 - e. State. ZEILER at p. 17-18. For these reasons, it is ordered that Hale's PFD application is remanded to the Department of Revenue for reconsideration with instructions that the regulation, including the spousal exception, applies. State's Motion to Reconsider denied 18 December 1996.
 - f. . Notice of Appeal to Alaska Supreme Court filed January 22, 1997. Final briefs submitted November 1997. Possibility of filing class action suit under consideration by counsel.

Alaska State Legislature House of Representatives

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Sectional Analysis Senate CS for CS for HB 2()

Section 1: This is a technical change amending the cited statute number. AS 43.23.095(8) was the prior number of the statute which addressed allowable absences. The new statute addressing allowable absences is numbered AS 43.23.008.

Section 2: This section makes some stylistic changes to AS 43.23.005(a). The phrase "calendar year immediately preceding January 1 of the current dividend year" is replaced by the phrase "qualifying year." Part (6) is new and provides that individuals must be physically present in the state during the entire qualifying year unless they are gone for an allowable absence.

Section 3: This section includes a requirement that each person who leaves the state on an allowable absence must return to the state for a period of 72 consecutive hours every two years.

Section 4: This section makes a stylistic change. The words "calendar year immediately preceding that dividend" are replaced with the word "qualifying."

Section 5: This section is entirely new. Part (a) lists the allowable absences previously found under AS 43.23.095(8) with the addition of employees of the United States Congress and their staff and participants on a national athletic team which were previously found in regulation. Other additions are Foreign Service personnel, teacher exchange participants and the spouses, dependents and disabled dependents of eligible residents.

Part (17) of this section is taken from current regulation 15 AAC 23.163 and is included here into statute. This section clarifies the periods of absence, which are acceptable for an individual to claim and still be eligible to receive a permanent fund dividend.

Part (b) requires those individuals who are absent more than 180 days but are otherwise eligible, to be present in the state for six consecutive months prior to leaving the state.

Part (c) provides that anyone who was eligible for the prior ten dividends and may have been absent for 180 days or more each qualifying year of those dividends is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year. This provision does not apply to those members of Congress, their staff, and their spouses and dependents.



Representative Pete Kott

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Section 6: This section amends the style of writing in AS 43.23.028(a). The words "calendar year immediately preceding that dividend" are substituted by the word "qualifying."

Section 7: This section amends AS 43.23.095(8), modifying the definition of a state resident. "State resident" means an individual who is physically present in the state with the intent to remain "indefinitely, rather than "permanently." Most of this section is deleted and replaced by language in section 4 of this bill.

Section 8: This section defines the term "qualifying year" which is used in sections 2, 3 and 5 of this bill.

Section 9: This section makes section 4 (c) applicable only to those individuals absent during January 1, 1998, and thereafter.

Section 10: This section is entirely new. The section is in response to a ruling by the Superior Court in Zeiler v. State Department of Revenue which invalidated the Department of Revenue's regulation that authorized the payment of dividends to spouses of Alaskans who are out of state on allowable absences. This section reinstates the authority to pay these spouses and dependents. Individuals will be eligible provided; they would have otherwise been eligible and (1) applied for the 1998 dividend during the 1998 application period; or (2) if the individual did not apply during the 1998 application period, applies for the 1998 dividend before the end of the 1999 application period.

The Department of Revenue is instructed to prescribe and furnish an application form for those in this situation.

Section 11: This section establishes retroactivity to January 1, 1998 for section 10.

Section 12: This section establishes an immediate effective date for sections 10 and 11.

Section 13: This section establishes an effective date of January 1, 1999 for sections 1,2, and 4-9.

Section 14. This section establishes an effective date of January 1, 2000 for section 3.

LEGAL SERVICES

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MEMORANDUM

March 10, 1998

SUBJECT: Absences for religious missions and eligibility for PFDs
(SCSCSHB 2)

TO: Representative Pete Kott
Attn: Nicole Thibodeau

FROM: Tamara Brandt Cook
Director

TBC

You have asked about including absences for religious missions among the allowable absences for purposes of eligibility for permanent fund dividends. It is possible that such a provision will be susceptible to challenge under the equal protection clause of the state constitution. Under the state equal protection clause, a statute is evaluated on a sliding scale under which the goal of the legislation and the importance of the individual rights affected are considered. (State v. Anthony, 810 P.2d 155 (Alaska 1991)) As the importance of the individual rights affected increases, the burden increases on the state to show that the state's goal justifies the intrusion on the individual's interests in equal treatment and that the state's goal is rationally related to the means chosen to achieve the goal.

An individual's interest in receiving a permanent fund dividend is accorded a low level of protection under the state equal protection clause because only an economic interest is implicated and that interest is not based on the need of the applicant. (Underwood v. State, 881 P.2d 322 (Alaska 1994)) However, even minimum scrutiny under the state constitution may be more demanding than under the federal constitution. (State Department of Revenue v. Cosio, 858 P.2d 621 (Alaska 1993))

(State Department of Revenue)
What is the state's goal in treating individuals who are absent for religious missions differently from individuals who are absent for other reasons? It is possible that, in applying a minimum scrutiny equal protection test, the court would find that a sufficiently rational basis exists for treating individuals on religious missions differently from other residents who have good reasons for leaving the state, but the basis for the distinction does not immediately occur to me.

This logic points out the fact that the existing allowable absences statute may be vulnerable to an equal protection challenge as it is written, simply because the state has drawn distinctions between people based upon the reasons they may be absent from the state (judging some to be more worthy than others) and it is not clear that those distinctions actually bear much relationship to the underlying question of whether a particular individual

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is or is not an actual state resident. In this regard, let me hasten to add that the court has upheld a difference in treatment between full-time and part-time students who are absent, so it is clear that some differences will be upheld. (State, Department of Revenue v. Bradley, 896 P.2d 237 (Alaska 1995))

In addition to the possible equal protection problem created when one class of people is permitted to be absent from the state while other classes are not, it is possible that treating absences for religious missions as allowable under the permanent fund dividend program would be held to violate the establishment clause of the state or federal constitution. It might be possible to argue in defense of the suggested change that the existing statute, in not permitting absences from the state for religious reasons while permitting absences for certain other reasons, places an unconstitutional burden on religious practice or belief. Such a defense would have been bolstered by the federal Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.) and Sherbert v. Verner, 374 U.S. 398 (1963), holding that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.

However, since the United States Supreme Court has found that the Religious Freedom Restoration Act is invalid, it appears doubtful that the defense would prevail. (City of Boerne v. Flores, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)) The U. S. Supreme Court has also previously acknowledged that the Sherbert "compelling interest" test has only been successful in unemployment compensation cases and the court has declined to apply it in other contexts, finding instead that a law of general applicability that only incidentally burdens religious practices should not be deemed invalid. (Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990))

TBC:jdr

98-144.jdr

SENATE FINANCE COMMITTEE
SUMMARY OF SCS CS HB 2 (FIN)

As of February 9, 1998

- 1) This bill reinstates the allowable absence for piggybacking spouses prospectively starting with the 1998 Permanent Fund Dividend (PFD) (*Sections 4, 9, 10, 11 and 12*);
- 2) Effective for the 1999 PFD, it minimally narrows allowable absences by placing all existing statutory and regulatory absences into statute (using some of the more explicit language currently in regulation) except the
 - a) Peace Corp absence currently allowed by statute;
 - b) Commissioner's current statutory authority to adopt new absences by regulation;
 - c) athletic team participation absence currently allowed by regulation; and
 - d) currently proposed regulatory absence for Public Health Service (*Sections 4 and 12*);
- 3) Effective for the 1999 PFD, it amends the two year return rule to require applicants to be in state for at least 72 consecutive hours (3 days) in the two year period, as opposed to the current "touch the earth" requirement (*Sections 2 and 12*).
- 4) Effective for the 1999 PFD, it places into statute the current regulatory requirement that an individual must have been a state resident for at least six consecutive months before the individual can claim an absence allowed to exceed 180 days during the qualifying year (*Sections 4 and 12*).

SENATE FINANCE COMMITTEE
SUMMARY OF SCS CS HB 2 (FIN)

As of February 9, 1998

- 5) Effective prospectively starting January 1998, it limits to 10 the number of consecutive PFDs an applicant could receive based on qualifying years during which the applicant was absent more than 180 days per year. To re-establish eligibility the applicant would have to return to the state and live for a year without being absent more than 180 days during that year. This limitation does not apply to
 - a) the Alaska Congressional delegation;
 - b) the Alaska delegation staff; and
 - c) spouses and dependants of the Alaska Congressional delegation and the delegation's staff
(Sections 4, 8 and 12);
- 6) Effective for the 1999 PFD, it modifies the current definition of state resident for permanent fund dividend purposes substituting the term "indefinitely" for "permanently" to conform to the general state residency definition in AS 01.10.055(a), and removing all reference to allowable absences (Sections 6 and 12);
- 7) Effective for the 1999 PFD, it defines and substitutes the term "qualifying year" for the lengthy description currently appearing in several places in the PFD statutes (Sections 2, 3, 5, 7 and 12); and
- 8) Finally, this bill updates statutory references in other law to correspond to the new absence section added by this legislation (Sections 1 and 12).

SENATE FINANCE COMMITTEE
SCS CS HB 2 (FIN) SECTIONAL ANALYSIS

February 9, 1998

Sec. 1: Amends AS 23.40.210(e), the definition of state resident for determination of employee cost of living adjustments, to update the statutory reference to allowable absences.

Sec. 2: Amends AS 43.23.005(a) by

- a) eliminating redundant language;
- b) substituting the term "qualifying year" for the technical description of that period;
- c) adding a 72 consecutive hour minimum to the current two year return rule; and
- d) adding to the list of eligibility criteria the requirement that an individual must have been physically present or only absent for a reason specifically allowed by law, referencing the new section of law that addresses allowable absences.

Sec. 3: Amends AS 43.23.005(d) by substituting the term "qualifying year" for the technical description of that period.

Sec. 4: Establishes a new allowable absences section AS 43.23.008

- a) minimally narrowing allowable absences by re-enacting all existing statutory and regulatory absences into statute (using some of the more explicit language currently in regulation) except the
 - i) Peace Corp service absence currently allowed by statute;
 - ii) Commissioner's current statutory authority to adopt new absences by regulation;
 - iii) athletic team participation absence currently allowed by regulation; and
 - iv) currently proposed regulatory absence for employment by the Public Health Service.
- b) placing in statute the current regulatory requirement that an individual must have been a state resident for 6 months immediately before departing on an allowable absence of more than 180 days; and

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SCS CS HB 2 (FIN) SECTIONAL ANALYSIS

February 9, 1998

- c) Limiting to 10 the number of consecutive dividends an applicant could receive based on qualifying years during which the applicant was absent more than 180 days per year. To re-establish eligibility the applicant would have to return to the state and live for a year without being absent more than 180 days during that year. This limitation would not apply to the
 - i) Alaska Congressional delegation;
 - ii) Alaska delegation staff; and
 - iii) spouses and dependants of the Alaska Congressional delegation and the delegation's staff.

Sec. 5: Amends AS 43.23.028(a) by substituting the term "qualifying year" for the technical description of that period.

Sec. 6: Amends AS 23.23.095 by

- a) removing all existing allowable absences from the definition of state resident; and
- b) substituting the term "indefinitely" for the word permanently in the definition of state resident to conform with the statutory definition of state resident that appears in AS 01.10.055.

Sec. 7: Amends AS 23.23.095 by adding a new subsection (10) to define the term "qualifying year" consistent with existing law.

Sec. 8: Enacts temporary law that makes the 10 consecutive year limitation on absences greater than 180 days per year prospective starting January 1, 1998.

Sec. 9: Enacts temporary law that

- a) allows "piggybacking" spouses to qualify for the 1998 dividend; and
- b) provides a method for the department to accept applications from those spouses.

Sec. 10: Establishes a January 1, 1998 effective date for the "piggybacking" spouse provision of section 9.

SENATE FINANCE COMMITTEE
SCS CS HB 2 (FIN) SECTIONAL ANALYSIS

February 9, 1998

- Sec. 11:* Establishes an immediate effective date for sections 9 and 10.
- Sec. 12:* Establishes a January 1, 1999 effective date for the rest of the bill, making those changes effective for the 1999 dividend.