

MEMORANDUM

State of Alaska Department of Law

TO: Shelley Higgins
Administrative Law Judge
Office of Tax Appeals
Department of Administration

DATE: November 5, 1997

FILE NO.: 223-98-0138

TELEPHONE NO.: 465-3600

SUBJECT: Donald MacDonald Appeal

FROM: John B. Gaguine
Assistant Attorney General
Governmental Affairs - Juneau

You have asked us for an opinion relating to the validity of a longevity bonus regulation, 2 AAC 40.090(b), which you believe may be in conflict with the longevity bonus statutes, AS 47.45, and may be unconstitutional as applied to Donald MacDonald, the appellant in the case before you. Because our office represents the Division of Alaska Longevity Programs, a party to this appeal, we offer these comments as advocates for the division. We have mailed Mr. MacDonald a copy of these comments.

On the statutory consistency question, we would note first that there is in Alaska a presumption that a regulation is consistent with its authorizing statute, and that the party challenging a regulation bears the burden of demonstrating its invalidity. *State, Dept. of Revenue v. Cosio*, 858 P.2d 621, 624 (Alaska 1993). Because we understand that Mr. MacDonald has not raised the issue of the regulation's invalidity, it seems to us that the presumption should govern.

At any rate, the regulation is consistent with the longevity bonus statutes. This is because of the difference between "forfeiture" of a bonus -- the issue raised by Mr. MacDonald's appeal, and addressed by 2 AAC 40.090(b) -- and disqualification for the bonus, the matter addressed by AS 47.45.030(a). We are attaching a 1980 opinion from our office which addresses this difference. We are also attaching a 1978 opinion which also addresses the difference, using the terms "suspension" and "disqualification."

We do not believe that the definition of "unqualified person" in AS 47.45.070, which you cite, makes the regulation invalid. A qualified person, such as Mr. MacDonald, can forfeit one, two or three bonuses because of an absence from the state without becoming disqualified. We do not agree that the omission of the term "forfeiture" from AS 47.45.050 and 47.45.060 means that the legislature regarded actions such as the one taken against Mr. MacDonald as a disqualification. It is at least as likely that the legislature did not believe that

hearings and judicial challenges were appropriate for minimal deprivations such as that suffered by Mr. MacDonald.¹

Moreover, a long-standing administrative interpretation of a statute is entitled to some weight. *Usibelli Coal Mine, Inc. v. State, Dept. of Natural Resources*, 921 P.2d 1134, 1142-43 (Alaska 1996). The 1980 attorney general's opinion cited above refers to the "long-standing policy of not allowing [bonus] payments even in cases of medical emergency when a bonus recipient is confined to a hospital out-of-state for more than 30 days." Thus, the Department of Administration has not paid bonuses to persons in Mr. MacDonald's situation for at least 17 years, and probably considerably longer.² Given that this policy is not clearly inconsistent with any provision of AS 47.45, the regulation codifying the policy should be upheld for this reason alone.

We do not believe that there is an equal protection problem with this regulation as applied to Mr. MacDonald. We note that, because this matter concerns only monetary benefits, it is reviewed at the bottom of the "sliding scale" used in analyzing equal protection claims under the Alaska constitution. *State v. Anthony*, 810 P.2d 155 (Alaska 1991) (claim concerning permanent fund dividend). Nothing in this regulation forces Mr. MacDonald to go to Washington for medical treatment; he apparently does so in order to save money.³ But a similarly situated person not a veteran, who would remain in Alaska, would have to expend private funds for treatment, funds that Mr. MacDonald, by using VA services, does not have to spend. Thus, Mr. MacDonald and your hypothetical non-veteran with the same medical problems are not similarly situated, and there are no equal protection problems in denying Mr. MacDonald longevity bonuses in the situations presented here.

Thank you for affording us the opportunity to be heard on this matter.

¹ The commissioner of administration has authorized hearings in situations other than disqualifications; *see* 2 AAC 40.145(a) ("The administrator will grant an administrative hearing to a person who has been denied benefits under [the bonus program]"). This regulation, and not AS 47.45.050, is what entitled Mr. MacDonald to a hearing. Because AS 47.45.050 is not the only statute cited as authority for this regulation, the regulation cannot be seen as standing for the proposition that "disqualification" in AS 47.45.050 means any situation in which a person is denied a monthly payment.

² It seems likely that the policy arose as a result of the 1978 attorney general's opinion referenced above.

³ If Mr. MacDonald has both Medicare Part A and some sort of Medigap insurance, it is unclear why he would be going to Washington for treatment. If he lacks one or both, the savings are obvious. We are assuming, then, that he is lacking one or both.

Shelley Higgins, Administrative Law Judge
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Attachments

cc: Hon. Mark Boyer, Commissioner of Administration
James Kohn, Director, Div. of Alaska Longevity Programs
Karen Phillips, Div. of Alaska Longevity Programs
Donald MacDonald