

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

IN THE MATTER OF

D.H.

Case No. OAH 05-0250-PFD

2004 Permanent Fund Dividend

DECISION & ORDER

I. Introduction

D.H. timely applied for a 2004 permanent fund dividend. The Permanent Fund Dividend Division determined that Mr. H. was not eligible, and it denied the application initially and at the informal appeal level. Mr. H. requested a formal hearing by written correspondence. The administrative law judge affirms the division's decision.

II. Facts

Mr. H. serves in the United States Air Force. After he lived in Alaska for almost exactly three years, the Air Force transferred Mr. H. out of state on July 7, 1998. Mr. H. does not expect to move back to Alaska before he retires on July 15, 2010. Between the time he left Alaska and the time he applied for a 2004 dividend, Mr. H. returned to Alaska three times for a total of 19 days.

Mr. H. owns a house in Eagle River. The house is currently rented out, but Mr. H. states that he intends to live in this house when he separates from the military. Mr. H. is registered to vote in Alaska, and he has listed Alaska as his state of legal residence in his military personnel records. Mr. H. maintains an Alabama driver's license, and has a vehicle registered in Alabama.

III. Discussion

Mr. H. has raised two preliminary issues that should be addressed. First, Mr. H. correctly states that he meets the eligibility requirements of AS 43.23.005-011, and he argues that "the specification in Alaska statutes override PFD regulations."

In *Church v. State*,¹ the Alaska Supreme Court said,

We have held that AS 43.23.015(a), the statute concerning proof of eligibility for PFDs, authorizes "and require[s] the Commissioner of the Department of Revenue to promulgate regulations defining substantive eligibility requirements for PFDs." *State, Dep't of Revenue*

¹ *Church v. State, Dept. of Revenue*, 973 P 2d 1125 (Alaska 1999).

v. Bradley, 896 P.2d 237, 239 (Alaska 1995)(citing *Cosio*, 858 P.2d at 624-25). *Cosio* held that a regulation can "exclud[e] permanent fund dividend applicants who arguably fall within the statutory definition of eligible applicants," as long as the exclusion is consistent with the statutory purpose and is not unreasonable or arbitrary. *Id.* at 625. In *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728, 732 (Alaska 1995), we held that 15 A A C 23.42.175(c)(6), which denies PFDs to seasonal residents, was not beyond the authority of the commissioner to promulgate and that the regulation was consistent with the purpose of AS 43.23.095(8), which is "to limit payment of dividends to permanent residents." *Id.* The *Brodigan* opinion also stated that a legitimate purpose of the regulation was to "ease the administrative burden of attempting to determine what treatment level is sufficient to merit eligibility for a PFD."

Mr. H. is thus incorrect in the assertion that PFD regulations may not impose substantive eligibility criteria beyond those contained in statutes. Even if the regulation does not separate residents from nonresidents with complete accuracy in every case, it is legitimate so long as it is not unreasonable or arbitrary. Regulations creating presumptions that people are no longer Alaska residents if they have been out of the state for a certain length of time, or have not returned to the state frequently, are reasonably related to determining whether a person is still an Alaska resident.

Secondly, Mr. H. complains about the content of the division's informal appeal decision, which contains a list of enumerated paragraphs labeled as "facts." Mr. H. states that "what these 'facts' contain are partial truths and then interpolations or interpretations that are not facts." Mr. H. is not the first appellant to complain of the mixing of facts and conclusions. "Fact 7" in the decision is typical:

The information in your file shows you maintain ties in the state of Alaska, including maintaining Alaska as your state of legal residence (SLR) on your leave and earnings statements (LES's), you have been registered to vote in Alaska since June 19, 2002 and you are listed as the owner of property located at *** Katelyn Circle in Eagle River, Alaska. Any ties you maintained to Alaska at the time you filed your 2004 application are weak at best and bear little if any weight. Your actions relative to this criterion are not indicative of an intent to return to Alaska to remain indefinitely.

In the formal hearing request form, Mr. H. was asked whether this "fact" was true or false. If he believed the "fact" to be false, Mr. H. was given a part of one line to write the correct fact. Because this "fact" contains three facts and two conclusions, it is difficult for an applicant to meaningfully respond. The somewhat patronizing and insulting tone of the first conclusion is not particularly helpful to applicants trying to understand why their applications have been rejected. In this case, the conclusion is wrong as well; ownership of a home in Alaska is a strong tie that bears considerable weight. Voter registration, while easily maintained by a nonresident, is still not a tie

that could be labeled "weak at best." In the remainder of this decision, rather than reviewing the informal conference appeal, I will consider the evidence in the file and apply the law directly to it.

The applicable regulation is 15 A A C 23.163(f)-(h). The regulation is lengthy and complex. Rather than describing it and discussing its meaning, I simply quote it:

(f) An individual whose absence or combination of absences, under a provision of AS 43.23.008 other than AS 43.23.008 (a)(9)-(10), totals more than five years is presumed not to have the intent to return to Alaska and remain indefinitely in Alaska and consequently that individual's absence is not allowable. In such a case, the individual is not eligible for a dividend payment unless the individual provides, with the individual's application or in timely response to a request by the department, documentation that demonstrates to the department's satisfaction an intent at all times during the absence or absences to return to Alaska and remain indefinitely in Alaska.

(g) When considering whether an individual who has been absent for more than five years has rebutted the presumption that the individual does not have the intent to return to Alaska and remain indefinitely in Alaska, the department will consider one or more of the following factors, as applicable:

(1) the length of the individual's absence compared to the time the individual spent in Alaska before departing on the absence;

(2) the frequency and duration of return trips to Alaska during the absence; the fact that the individual has returned to Alaska in order to meet the physical presence requirement of AS 43.23.005 (a)(4) is not sufficient in itself to rebut the presumption of ineligibility;

(3) whether the individual's intent to return or remain is conditioned upon future events beyond the individual's control, such as economics or finding a job in Alaska;

(4) any ties the individual has established outside Alaska, such as maintenance of homes, payment of resident taxes, vehicle registrations, voter registration, driver's licenses, or receipt of benefits under a claim of residency in another state;

(5) the priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel;

(6) whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska; and

(7) any ties the individual has maintained in Alaska, such as ownership of real and personal property, voter registration, professional and business licenses, and any other factors demonstrating the individual's intent.

(h) When considering whether an individual who has been absent for more than five years has rebutted the presumption that the individual does not have the intent to return to Alaska and remain indefinitely in Alaska,

(1) the department will give greater weight to the claim of an individual who makes frequent voluntary return trips to Alaska during the period of the individual's absence than to the claim of an individual who does not;

(2) the department will generally consider that an individual who has not been physically present in Alaska for at least 30 cumulative days during the past five years has not rebutted the presumption; however, this consideration does not apply if the individual shows to the department's satisfaction that unavoidable circumstances prevented that individual from returning for at least 30 cumulative days during the past five years.

Subsection (h) makes it clear that of all evidence that can be considered, the most important is the frequency and duration of the applicant's return trips to Alaska. Mr. H. complains that he was never informed of the 30-day return rule. But as can be seen from the language of subsection (h), the 30-day rule is not so much a rule as a guideline for determining what is a lengthy return visit and what is a short one. 30 days is a standard that can be used to maintain uniformity in decisions. But even if Mr. H. had returned to Alaska for more than thirty days in the five-year period, he would still be presumed to no longer be an Alaska resident.

As noted above, Mr. H. does have some substantial ties to Alaska, the greatest being his house in Eagle River. Weighing in the opposite direction are the facts that Mr. H. only lived in Alaska for three years before being absent for more than five years, and that he intends his total absence to exceed ten years, a very long time to be gone and still claim to be a resident. A planned absence of a decade, even for military service, is a strong indicator that a person's life and career have led the person to make a home somewhere else. Mr. H. has a driver's license and a car registered in another state, but I do not find these factors to be particularly indicative of his intent or lack of intent to return to Alaska. In accordance with the regulation, I give great weight to the fact that, whether he was back slightly less or slightly more than thirty days, it has been a long time since Mr. H. has been seen much in Alaska. His returns have been infrequent, and they have not been very lengthy in duration. Considering all these factors, I find that Mr. H. has not overcome the presumption that he no longer intends to return to Alaska to remain indefinitely.

IV. Conclusion

Because Mr. H. no longer intends to return to Alaska to make his home and remain indefinitely, he is not an Alaska resident and is therefore ineligible for a 2004 dividend.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of D.H. for a 2004 permanent fund dividend be AFFIRMED.

DATED this 10th day of November, 2005.

By: Dale Whitney
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010.1, Dale Whitney, Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order relating to the eligibility of D.H. for a 2004 permanent fund dividend be adopted and entered in his file as the final administrative determination in this appeal.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the date of this decision, pursuant to 15 A A C 05.035(a). The motion must state specific grounds for relief, and, if mailed, should be addressed to: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days of the date of this decision.

DATED this 10th day of November, 2005.

By: Dale Whitney
Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Case Parties
11/10/05