

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

IN THE MATTER OF)
)
 M. & A. R.)
) Case No. OAH 06-0228-PFD
2005 Permanent Fund Dividend)

AMENDED DECISION & ORDER¹

I. Introduction

M. and A. R. timely applied for 2005 permanent fund dividends. The Permanent Fund Dividend Division determined that the applicants were not eligible, and it denied the application initially and at the informal appeal level. The R.s requested a formal hearing. Administrative Law Judge Dale Whitney heard the appeal on May 15, 2006. Mr. R. appeared by telephone. Susan Lutz represented the PFD Division by telephone. The administrative law judge finds the applicants to be eligible for a 2005 dividend.

II. Facts

The R. family first moved to Alaska in 1989 when Mr. R. was stationed at Fort Greely. The R.s were in Alaska until 1991. At this time, they had not decided to live in Alaska permanently.

In 1996, Mr. R. was stationed at Fort Wainwright, and upon this return to Alaska the R.s decided they wished to make Alaska their permanent home. At this time they formally changed their residency to Alaska, obtained Alaska driver's licenses, and registered their vehicles in this state.

Mr. R. again left Alaska under orders from the Army on July 11, 1998. Ms. R. left Alaska to join Mr. R. on March 27, 1999. The R.s returned to Alaska on January 2, 2006, and Mr. R. continues to serve at Fort Wainwright. Mr. R. will retire from the military in 2009. He testified that he and Ms. R. intend to remain in Alaska after his retirement. At the time of the hearing, the R.s had recently contracted to buy a house in North Pole. While they were absent from Alaska, the R.s did not establish any significant ties to any other state, and they maintained normal paper ties to Alaska. Mr. R. made several efforts to be reassigned to Alaska, including a bid to be stationed at Fort Greely, but these requests were denied until he was successful in obtaining his current assignment. As Mr. R. acquired vehicles, he registered them in Alaska on his return visits.

¹ The original Decision & Order incorrectly stated in the first paragraph that the administrative law judge was affirming the division's decision. This final decision corrects that error; no other changes to the decision have been made.

In the five years preceding their dividend application, the R.s made three return trips to Alaska for a cumulative total of eleven days.

III. Discussion

A person who has been allowably absent for more than five years is, by law, presumably not an Alaska resident anymore.² If an applicant attempts to overcome this presumption, the Division may rely on the following factors when making a decision³:

- (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.

When considering these factors, the Division must “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.”⁴ In considering what constitutes “frequent” return trips, thirty days in five years serves as a kind of guideline. Unless unavoidable circumstances have prevented return trips, the Division must “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” that he is no longer an Alaska resident.⁵ The final rule governing this

² 15 AAC 23.163(f).

³ 15 AAC 23.163(g).

⁴ 15 AAC 23.163(h)(1).

⁵ 15 AAC 23.163(h)(2).

case is that a person requesting a formal hearing has the burden of proving that the Division's decision was in error.⁶

The division has correctly analyzed the law in this case and applied the above factors, giving particular weight to the fact that the R.s had not been back to Alaska for more than thirty days in the five years prior to their applications. Under these circumstances, the division's decision was consistent with the regulatory directive that it "generally consider" someone in the R.s' situation to no longer be an Alaska resident. However, the division has overlooked a significant and in this case determinative fact.

The division determined that, during their absence, the R.s lacked the intent to return to Alaska to make their home. In making this determination, the division overlooked one key fact: that the R.s did actually move back to Alaska to remain indefinitely and make their home. Although they did not return to Alaska for thirty days in the five-year period, there is nothing that they did while absent that is inconsistent with their ultimate return. There is no evidence, or any reason to believe, that while they were absent the R.s may have wavered or vacillated about whether they would return to Alaska to make their home.

The regulation creating the measure of thirty days in five years provides a kind of yardstick for measuring the likelihood that a person still intends to return to Alaska. It is to be given great weight, but it is not an absolute rule; the division will *generally* follow it. It is a rare case when an applicant will be able to present such overwhelming evidence of intent to return to Alaska that the general rule should not be followed. The rule helpfully provides a concrete solution to the problem of actually measuring something as ethereal as a person's probable subjective intent.

In this case, reliance on the thirty-day measure produces a result that is somewhat silly. The measure indicates that the R.s do not intend to return to Alaska to make their home. It is plain to see, however, that the R.s have in fact already returned to Alaska to remain indefinitely and make their home, making conjecture about the likelihood of such a return an unproductive exercise. The rule incorrectly projects the unlikelihood of an occurrence that has already occurred. The result is akin to using the best available scientific methods to predict rain for yesterday, when everybody remembers a clear sunny day.

The general rule should not be applied to produce a result that is patently incorrect. This case is one of the few instances in which one of the "other factors demonstrating the individual's

⁶ 15 AAC 05.030(h).
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intent” to be considered under 15 AAC 23.163(g)(7) will outweigh all other factors, including the frequency and duration of the applicant’s voluntary return trips to Alaska.

IV. Conclusion

Considering all the evidence in this case, I find that Mr. and Ms. R. have rebutted the presumption that they no longer intend to return to Alaska to remain indefinitely and make their home. The R.s are Alaska residents and they are eligible for 2005 dividends.

V. Order

IT IS HEREBY ORDERED that the applications of M. and A. R. for 2005 permanent fund dividends be GRANTED.

DATED this 25th day of August, 2006.

By: Signed
DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 44.33.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 22nd day of September, 2006.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]