

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

IN THE MATTER OF)	
)	
I. E. AND P. L. H)	
)	OAH No. 06-0567-PFD
<u>2005 Permanent Fund Dividend</u>)	Agency No. 05604997_6

DECISION AND ORDER

I. Introduction

I. and P. H. timely applied for a 2005 permanent fund dividend (PFD). The Permanent Fund Dividend Division determined that they were not eligible, and it denied the applications initially and at the informal appeal level. Ms. and Mr. H. requested a formal hearing. Administrative Law Judge Christopher Kennedy heard the case on September 18, 2006, leaving the record open through October to allow the H.s to submit supplemental materials they wished to have considered.

The H.s moved on October 23, 2006 to reopen the hearing so that they could “question Susan Lutz,” who was the division’s advocate in the proceeding. Because Ms. Lutz is only an advocate, not a witness with personal knowledge about events at issue, and because the H.s have articulated no reason why she needs to be heard from again, the request to reopen the hearing is denied. The parties have had an adequate opportunity to present their cases.

After reviewing the evidence and the law, the administrative law judge concludes that the H.s are bound by a 2003 administrative determination that they did not, at that time, have the requisite intent to return to Alaska to remain Alaska residents. Because they are bound by that decision, they could not be eligible for a 2005 dividend unless they had physically returned to Alaska and reestablished residency prior to the beginning of the qualifying year. As it happened, they did not move back to Alaska until late 2005 or afterward, and they will likely remain ineligible until the 2007 or 2008 dividend.

II. Facts

The H.s first moved to Alaska in 1987, when Mr. H. received a military posting in Adak.¹ In 1992 Mr. H. began a military assignment in Europe, and the family left the state.² They continued to claim Alaska residency and they applied for dividends in some years.

¹ Ex. 1, pp. 3, 7 (2005 Adult Supplemental Schedules).

² Ex. 9 (decision in *In re H.*, Caseload No. 020683 (Alaska Dep’t of Revenue 2003)).

The H.s' application for a 2001 dividend initially was denied, primarily on the basis that they had failed to spend at least 30 days in the state in the preceding five years—which creates a strong presumption that the applicant has lost the intent to return to Alaska that is needed to maintain residency status—and that they had failed to rebut the resulting presumption.³ After an unsuccessful informal appeal, the H.s proceeded to the formal appeal level, where Administrative Law Judge Dale Whitney overturned the denial. He found that the H.s had overcome the presumption and that they remained Alaska residents as of the date of their application for the 2001 PFD.⁴

In 2002, the H.s applied again and again they were denied at the initial screening level. The H.s continued to fall below the 30-day threshold for visits to Alaska within the preceding five years, and again they were laboring against the presumption that absence creates. The H.s pursued an informal appeal which resulted in a three-page written decision on September 16, 2003.⁵ In the decision, the officer hearing the appeal reviewed the H.s' connections to Alaska as of a later time period than the 2001 appeal, and she concluded that the H.s had not overcome the presumption of nonresidence. She determined that they had lost their Alaska residency.

The H.s did not request a formal appeal of the September 16, 2003 decision.⁶

The H.s did not visit Alaska at all in 2002 or 2003. They briefly visited in the second week of December, 2004.⁷

I. H. separated from military service in Oak Harbor, Washington in September, 2005.⁸ At some time two or more months later the family moved back to Alaska.⁹

The H.s' 2005 PFD applications were denied on the basis that, after having severed their residency as determined in the September 16, 2003 decision, they had not returned to Alaska to reestablish residency prior to the beginning of the qualifying year. This appeal followed.

³ *Id.*

⁴ *Id.*

⁵ Ex. 10, pp. 1-3 (2002 Informal Appeal Decision).

⁶ I make this finding because there is no credible evidence that they initiated such an appeal. The H. "maintain" that they still, to this day, have an appeal pending from the informal appeal decision. To support this claim, they were given until October 30, 2006 to submit evidence that they had appealed the 2003 ruling, but they submitted no evidence. They apparently have no cancelled check to show they paid an appeal fee, and no copy of an appeal form.

⁷ Ex. 3, pp. 6, 15 (2005 Adult Eligibility Questionnaires).

⁸ Recording of hearing.

⁹ As of November 14, 2005 they were still in Oak Harbor. Ex. 3, p. 6 (2005 Adult Eligibility Questionnaire). By September of 2006 they had moved to Alaska.

III. Discussion

In order to qualify for a PFD, an individual must be an Alaska resident for all of the PFD qualifying year.¹⁰ An individual can remain an Alaska resident while living outside Alaska under some circumstances, such as active-duty military service, if the individual maintains at all times the intent to return to Alaska.¹¹

An individual's intent regarding where he plans to live in the distant future is not necessarily absolute or unwavering. Over several years, future plans can fluctuate. Future plans are often contingent on many factors that are not necessarily within the planner's control. The law imposes presumptions about an individual's intent to return to Alaska. The law also requires that, when determining whether an individual has maintained the requisite commitment to return to Alaska at all times during an absence of many years, intent is measured by certain objective criteria rather than a simple assessment of the credibility of the individual asserting that he consistently maintained that commitment.

By law, there is a presumption that a person who has been allowably absent for more than five years is not an Alaska resident anymore.¹² It is rare that a PFD applicant who spends the majority each year outside for more than five consecutive years is able to overcome the presumption that he has not maintained the intent to return to Alaska at all times during his absence.¹³ The law makes it especially difficult to overcome the presumption if the individual "has not been physically present in Alaska for at least 30 cumulative days during the past five years."¹⁴

The H.s faced this double handicap in 2001 and 2002: they had been absent for more than five years, and their visits to the state during the five-year period fell well below a cumulative total of 30 days. For the 2001 dividend, they pursued appeals and eventually overcame the handicaps. For 2002, they pursued one level of appeal and reached an adverse result. The appeal decision, issued on September 16, 2003, concluded that they were no longer residents. They did not appeal further.

The September 16, 2003 appeal result establishes, for purposes of this proceeding, that the H.s were not Alaska residents in 2002. The decision is conclusive because of a doctrine called collateral estoppel, designed to prevent people from wasting resources by litigating issues over and

¹⁰ Alaska Statute (AS) 43.23.005(a)(3).

¹¹ AS 01.10.055(c) & AS 43.23.008(a)(3).

¹² Alaska Regulation 15 AAC 23.163(f).

¹³ *In re R.*, OAH No. 06-0530-PFD (2006).

¹⁴ 15 AAC 23.163(h)(2).

over. In essence, when the same parties have disputed an issue in the past and the issue was resolved by a final decision in an adjudicatory proceeding that either takes place in court or offers “an adequate substitute for judicial procedure,” that issue is resolved when it arises in the future between those parties.¹⁵ In this case, the informal appeal afforded by the PFD division gave the H.s an opportunity to present their arguments and evidence by correspondence in a proceeding commensurate with the significance of the dispute, culminating in a decision with findings of fact and conclusions of law; it also gave them the option (which they did not use) to proceed to a second level of appeal with live testimony. It provided “an adequate substitute for judicial procedure” and can fairly be used to bind those who participated in it.

What the September 16, 2003 decision established that is relevant here is that the H.s were not Alaska residents in 2002. This means they needed to start over and reestablish Alaska residency before they could receive dividends. It is not possible for an adult to establish residency without being “physically present in the state.”¹⁶ Although a person can maintain residency while living outside the state in some circumstances, an adult cannot establish or reestablish Alaska residency while living outside Alaska.¹⁷ In this case, it is undisputed that Mr. and Mrs. H. did not set foot in Alaska between 2002 and December, 2004, when the qualifying year for the 2005 dividend was almost over. This means that they were not Alaska residents in the early part of 2004.

The most fundamental eligibility requirement for a PFD is that the applicant be “a state resident during the *entire* qualifying year.”¹⁸ Since the H.s were not state residents when the qualifying year for the 2005 dividend began, they were not eligible for that dividend.¹⁹

IV. Conclusion

Because a prior appeal decision establishes that the H.s were not Alaska residents after 2001, and because they did not return to Alaska to reestablish residency before the qualifying year for the 2005 dividend began, they are not eligible for the 2005 PFD.

¹⁵ See generally *Alaska Contracting & Consulting, Inc. v. Alaska Dep’t of Labor*, 8 P.3d 340, 344-45 (Alaska 2000); *Aloha Lumber Corp. v. University of Alaska*, 994 P.2d 991, 1001-02 (Alaska 1999); *Briggs v. State, Dep’t of Motor Vehicles*, 732 P.2d 1078, 1081-82 (Alaska 1987).

¹⁶ Alaska Statute 01.10.055(a).

¹⁷ 15 AAC 23.143(b).

¹⁸ Alaska Statute 43.23.005(a)(3) (italics added).

¹⁹ The H.s are probably ineligible for a 2006 dividend as well, because they were absent for Mr. H.’s military duty for most of 2005, the qualifying year. Their one-week visit in late 2004 was probably too brief to reestablish residency such that they could take advantage of the allowable absence for military personnel. See 15 AAC 23.163(b). While not a decision regarding the 2006 dividend, this footnote is supplied to assist the H.s in assessing their appeal prospects regarding the 2006 dividend.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the applications of I. E. H. and P. L. H. for a 2005 permanent fund dividend is AFFIRMED.

DATED this 28th day of December, 2006.

By: Signed
Christopher Kennedy
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 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 after the date of this decision.

DATED this 31st day of January, 2007.

By: Signed
Signature
Jerry Burnett
Name
Director, Admin Services
Title

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