

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

In the Matter of:)
)
V V,)
L V,)
R V,)
X V, and)
Y V)
)
2006 Permanent Fund Dividend) OAH No. 07-0104-PFD
 Agency No. 06189723_8

DECISION AND ORDER

I. Introduction

Chief Warrant Officer V V and his family timely applied for 2006 permanent fund dividends (PFDs). A career army man, Mr. V has been posted outside Alaska for the last twelve years. Despite continuing contacts with Alaska and periodic visits, deployments to Afghanistan and Iraq caused him to fall short of the thirty-days-in-five-years threshold that is usually required to preserve PFD eligibility. The Permanent Fund Dividend Division applied the double presumption of ineligibility for people absent from the state more than five years who do not visit for thirty days in the five years, and denied the family’s applications initially and at the informal appeal level. At the Vs’ request, a formal hearing was held on April 6, 2007.

This is a close case in which the division acted reasonably based on the evidence before it at the time. After a more complete exploration of the issues at the hearing, however, the division’s denial is reversed because Mr. V and his family demonstrated that they are entitled to an exception from the 30-day rule and, by the scantest of margins, sufficiently demonstrated ongoing ties to Alaska to rebut the single presumption of ineligibility that stems from their out-of-state posting exceeding five years.

II. Facts

The facts of this case are not in dispute, the sole issue being their legal significance. Unless otherwise attributed, the facts set out below are based on testimony at the hearing.

Chief Warrant Officer V V has been in the military for 21 years. L is his spouse and R, X, and Y are their children, living with them, for whom they are sponsors.¹

¹ Roxanne turned 18 in May of 2006, so that this will be her last year as a sponsored applicant.

Mr. V moved his family to Alaska in 1990, at the age of 26, and remained here for a little more than four years.² From that time on he has been posted outside the state and his family has accompanied him (with the exception of deployments to war zones). He has requested posting in Alaska on multiple occasions and his efforts in that direction appear to be genuine.³

During the latter half of the 1990s the Vs lived in Colorado, Germany, and Italy, visiting Alaska occasionally.⁴ The prolonged overseas assignments caused the family's five-year total of days in Alaska to fall below thirty at one point, and the division denied their year 2000 PFD applications by applying the two presumptions that have been applied in this case.⁵ The family appealed, with Mr. V traveling from Italy to Germany for the hearing. Revenue Examiner Dale Whitney applied both presumptions of ineligibility but found that the Vs had overcome both of them, giving "extraordinary weight to Mr. V's personal testimony."⁶

At the time of the September, 2001 hearing on the 2000 applications, Mr. V was nearing the end of the Italian tour, had requested assignment to Alaska, and had received a recommendation for approval of that assignment from his commanding officer.⁷ During the same period he took some preliminary steps toward buying a house in Anchorage.⁸ As it later turned out, the Alaska posting did not come to pass.

In the five years preceding his application for a 2006 dividend, Mr. V was stationed outside Alaska and returned on three occasions: 2001 (4 days), 2002 (13 days), and 2004 (9 days). There were also visits in 2000 and 2006, although these fell just outside the five-year window at issue in this case. His wife joined him for all but the brief 2001 visit,⁹ and the children came as well on some or most of the trips.¹⁰ Some trips were on commercial flights and some on military transport.¹¹

Military duties substantially interfered with Mr. V's ability to visit Alaska during the 2003-2005 period. For the entirety of 2003 Mr. V was deployed to the Iraq theater. Upon his return in early 2004 he was given block leave in the summer, which he devoted in part to an Alaska trip. The

² Exhibit 5, p. 1, Fact 1 (Informal Appeal Decision); Exhibit 6, p. 4 (appeal letter, not contesting residency dates).

³ The most recent can be seen at Exhibit 2, pp. 5-6 (e-mail chain showing request for Alaska assignment upon return from Iraq).

⁴ *In re V*, No. 010327 (Dept. of Revenue 2001) at 1 [hereinafter "*V I*"].

⁵ *V I*.

⁶ *V I* at 2.

⁷ *V I* at 2.

⁸ *V I* at 2.

⁹ Exhibit 2, p. 10 (2006 Adult Eligibility Questionnaire).

¹⁰ Testimony of Mr. V; Exhibit 2 pp. 15-16 (boarding passes).

¹¹ Testimony of Mr. V; Exhibit 2 pp. 15-16 (boarding passes).

year 2005 was occupied entirely by preparations for and deployment to Afghanistan; his return from there in early 2006 was followed immediately by temporary duty in Virginia that continued until June. His June 2006 trip to Alaska was made at his first opportunity for leave since 2004. Mrs. V, who has young children, does not travel without her husband.

In 2004 the Vs bought a residential building lot in the Heritage Farms subdivision in Wasilla at a cost of about \$40,000. Mr. V plans to retire from the military in 2009. He relates that he hopes to work as a civilian at one of the Anchorage-area military bases.

All parties agree that the Vs have maintained paper ties with Alaska such as driver's license and voter registration and keep bank accounts here.¹² Mr. V's military records show Alaska as his state of legal residence. The family has not established significant ties with any other state or country. They have relatives in Alaska.¹³

III. Discussion

To be eligible for a permanent fund dividend, a person must be a state resident at the time of application and during the qualifying year for the dividend in question.¹⁴ A person establishes residency "by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state."¹⁵ It is undisputed that Mr. and Mrs. V established residency in the early 1990s. Once a resident, a person remains so even if absent from the state unless the person "establishes or claims residency" elsewhere—again, it is undisputed that the Vs have not done this—or "performs other acts or is absent under circumstances that are inconsistent with the intent" to remain in Alaska and make a home here.¹⁶

It is this last provision that presents the single issue in this case. It is undisputed that the Vs were on allowable absence from Alaska while Mr. V served in the military.¹⁷ But the division contends that Mr. and Mrs. V have lost the intent to return to Alaska and make their home here, thus losing their Alaska residency. The division's contention as to the three children is derivative: if the parents are no longer Alaskans, the children have no eligible sponsor.¹⁸

¹² Exhibit 7, p. 3 (division's position statement).

¹³ Exhibit 2, p. 6.

¹⁴ AS 43.23.005(a).

¹⁵ AS 01.10.055(a).

¹⁶ AS 01.10.055(c).

¹⁷ AS 43.23.008. One legal wrinkle should be mentioned: Mrs. V and the children are still deemed to have been accompanying Mr. V even when not physically with him, so long as he was deployed on remote tours to Iraq and Afghanistan where dependents are not allowed. *See In re M.N.T.*, No. 06-0715-PFD (Dept. of Revenue 2006).

¹⁸ In general (with exceptions that do not apply here), children need to be in the lawful and physical custody of a person eligible for a dividend. 15 AAC 23.113.

In reaching its conclusion that the Vs have lost the required intent, the division applied two presumptions from the PFD regulations. The regulation at 15 AAC 23.163(f) establishes a presumption that any person who is absent from the state (other than for a reason relating to Congressional service) for more than five consecutive years “is presumed not to have the intent to return to Alaska and remain indefinitely in Alaska.” The presumption is rebuttable. However, 15 AAC 23.163(h) provides that “the department will generally consider” the presumption unrebutted when an individual has not visited the state for at least 30 cumulative days during the five-year period. This provision establishes, in effect, a presumption within the presumption that makes it extraordinarily difficult for a person who lives outside Alaska and visits fewer than 30 days in five years to retain eligibility for a dividend.

The Vs rebutted the double presumption in 2000-2001, when they had been absent from the state for about six years and fell a few days short of the 30 days’ visitation. Now they have been absent for twelve years, and they again have fallen short of the 30-day threshold.

This time, the second level of the double presumption does not operate. 15 AAC 23.163(h)(2) provides that the 30-day presumption does not apply if “unavoidable circumstances” prevented the individual from returning for 30 days. Here, the five-year period during which Mr. V needed to make 30 days of visits to avoid the presumption ran from 2001 through 2005. Notwithstanding his long deployment to the Persian Gulf, Mr. V was well on his way to meeting the 30-day threshold—he had 26 days already—at the end of 2004. But in 2005 he was deployed to Afghanistan, and preparations for that deployment followed by the deployment itself wholly prevented him from taking leave in the last year of the five year period. This qualifies as “unavoidable circumstances.” The same exception should be applied to Mrs. V, who understandably chose not to come to Alaska with several children while her husband was in Afghanistan. She waited until he returned, and then came in 2006.

Since the second presumption does not apply, one is left only with the five-year presumption. The department’s regulations provide a list of seven factors that it will consider, where applicable, in determining whether the applicant has rebutted the presumption.¹⁹ These are reviewed below:

1. *Length of absence compared to time in Alaska before departing.* This was a factor the division relied heavily on in deciding that the Vs had not overcome the presumption, correctly

¹⁹ 15 AAC 23.163(g).

noting that the Vs lived in Alaska for four years and have now been absent nearly twelve. One must recall, however, that the department found the Vs to be Alaska residents in late 2001. Since that time, Mr. V's anticipated retirement from the military has been delayed while he served in Iraq and Afghanistan. The decision to delay retirement in these circumstances ought not to be held against him.

2. *Frequency and duration of return trips to Alaska.* The Vs returned to Alaska fairly frequently when they lived in Colorado, but their visits were relatively infrequent while they were stationed in Europe, leading to the initial denial of their 2000 applications.²⁰ Between 2000 and 2002 Mr. V visited three times for a total of 34 days, but the pace of the visits fell off again and he came only once during the three-year period surrounding his war zone deployments. Notably, he came back again in the summer of 2006, after the qualifying period for the 2006 dividend had expired but before this denial had occurred.

3. *Whether intent to return is conditioned on future events beyond the individual's control, such as economics or finding a job in Alaska.* Mr. V does plan to work following his military retirement, and so in a sense his return is contingent on being able to find a job here. However, he plans to work as a contractor on a military base, and the length of his experience coupled with the availability of large bases in Alaska make his employment prospects good.

4. *Any ties the individual has established outside Alaska (homes, taxes, voter registration, etc.).* These are essentially nil, as the division concedes. Mr. V lives in base housing and has had ties to other locations only as the law requires.

5. *Priority the individual gave Alaska in employment assignment preference.* Mr. V has pushed for an Alaska assignment from the army at least twice: once in 2001 when he was almost successful, and once in 2004 when he asked for an Alaska assignment in part to help care for his wife's sister here. This appears to account for the last two cycles in his duty-station assignments.

6. *Whether the individual chose a career path that does not allow return to Alaska.* This is not true of the Vs in the long run; a military career is conducive to retirement during middle age so that a second career can be pursued in the location of choice. Of course, service in the military can place a short-term impediment on return to Alaska, but it is unlikely that this regulatory

²⁰ VI at 1.

factor was intended to cut against members of the military on account of that obvious consequence of military service.²¹

7. *Ties to Alaska such as real property, voter registration, etc.* The Vs purchased a \$40,000 residential building lot in Alaska in 2004 and retain full paper ties to the state, including voter registration. They also have family ties here.

Taking all of these factors into account, I find that the Vs have rebutted the single presumption created by an absence exceeding five years. They have established, by a narrow margin, that they retain the necessary intent to return to Alaska to remain indefinitely. Since this is the sole issue in the present case, the Vs are entitled to a 2006 permanent fund dividend.

Because the five-year-absence presumption continues to operate, the division would be justified in continuing to pay close attention to the Vs' eligibility in future years.

IV. Conclusion

Regarding their 2006 dividend, V and L V were subject to a rebuttable presumption that they had lost the intent needed to maintain Alaska residency. They were not subject to the second-level presumption ordinarily applied to people who have fewer than 30 days of visits to Alaska in five years. They have presented evidence sufficient to overcome the single presumption, and they are eligible for the 2006 dividend. Because Mr. and Mrs. V are eligible, their minor children do not lack eligible sponsors and they are likewise eligible.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the applications of V V, L V, Y V, R V, and X V for 2006 permanent fund dividends is REVERSED.

IT IS FURTHER ORDERED that the applications of V V, L V, Y V, R V, and X V for 2006 permanent fund dividends be GRANTED.

DATED this 16th day of April, 2007.

By: Signed
Christopher Kennedy
Administrative Law Judge

²¹ To discriminate against military members because of their "career choice" would be difficult to square with legislative intent, the legislature having gone out of its way to protect the eligibility of people choosing this career path. See AS 43.23.008(a)(3).

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 14th day of May, 2007.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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