

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

In the Matter of:

C.T.

2005 Alaska Permanent Fund dividend

OAH No. 07-0698-PFD

DOR No. 0600185-1

DECISION and ORDER

I. Introduction

C.T. applied for and on October 19, 2006, was paid a 2006 Permanent Fund dividend. After paying the dividend, on December 29, 2006, the Permanent Fund Division issued a letter purporting to deny the dividend and demanding repayment.¹ Following an informal conference, on October 26, 2007, the division issued a decision purporting to sustain the denial of the application and the assessment of the dividend. Mr. T. filed a timely appeal and requested a hearing by correspondence.

Because Mr. T. has failed to demonstrate by a preponderance of the evidence that through December 11, 2006, he maintained the intent to return to Alaska and remain indefinitely, the appeal is denied.

II. Facts

C.T.'s parents moved to Alaska in 1949. Mr. T. was born in Alaska in 1954. His father has lived in the same house in Anchorage for 30 years. Mr. T. grew up in Alaska and maintained his Alaska residency throughout his adult life. As of January 1, 2005, his primary residence was a duplex in Anchorage.

In early 2005, Mr. T. decided to sell his Anchorage duplex. He continued working for a contractor through the spring, briefly traveling to Canada for ten days in April. On June 10, 2005, Mr. T. again traveled to Canada, where he married a Canadian citizen before returning to Alaska on June 20, 2005. After he returned, Mr. T. worked on his Anchorage duplex, getting it ready for sale. The duplex sold on September 20, 2005, at which time Mr. T. stored his belongings at his father's house. On October 29, 2005, Mr.

¹ Exhibit 6, pp. 1-3.

² Exhibit 8.

T. left Alaska to temporarily reside with his wife at her house in Canada, planning to return to Alaska in early January, 2006.

Through January 6, 2006, Mr. T. maintained the intent to return to Alaska and remain indefinitely. On that date, while still in Canada, Mr. T. submitted his written application for the 2006 Alaska Permanent Fund dividend. On the application, Mr. T. responded "yes" to the question "Are you physically in Alaska today?"³

After January 6, 2006, Mr. T.'s wife's employer offered her a temporary job assignment in Canada that was an attractive career opportunity. She accepted the new assignment, and Mr. T. abandoned his plan to return to Alaska in the short term.

Based on the information contained in Mr. T.'s application filed on January 6, 2006, the division determined that Mr. T. was eligible for the dividend, which was paid to him on October 19, 2006. Subsequently, based on information it had received independently of the application process but before granting Mr. T.'s application and paying the dividend, the division requested that Mr. T. submit supplemental information. Mr. T. submitted the supplemental information on December 11, 2006. At that time, Mr. T. was still living in his wife's house in Canada. Based on the additional information it had received, the division determined that Mr. T. was ineligible for the dividend and issued its decision of December 29, 2006. Mr. T. continued to live at his wife's home in Canada through at least January 22, 2008.

III. Discussion

A. Scope of Appeal

The division's letter of December 29, 2006, is titled "Denial & Assessment." It purports to deny the 2006 dividend, which had previously been paid, asserting that Mr. T. was not eligible for the 2006 dividend because he: (1) intentionally failed to disclose a reportable absence from Alaska;⁴ and (2) maintained his principal home in another country.⁵ The division's subsequent informal conference decision states, "[t]he denial of your 2006 application...is upheld." The decision asserts that Mr. T. was not eligible for the 2006 dividend

³ Ex. 1, p. 1 (#2).

⁴ Ex. 6, p. 2. See 15 A A C 23.103(j).

⁵ Ex. 6, p. 2. See 15 A A C 23.143(d)(1).

because he: (1) failed to disclose a reportable absence from Alaska;⁶ (2) maintained his principal home in another country;⁷ and (3) was not a state resident as defined by law throughout the qualifying year and on the date of application.⁸

AS 43.23.015(g) provides that an individual may appeal "a decision of the department determining the individual's eligibility for a permanent fund dividend." The division's initial letter and its informal conference decision purport to retroactively deny Mr. T.'s 2006 application and the dividend, even though the division had previously granted the application and paid the dividend; both decisions also demand repayment, under the authority of AS 43.23.035(b).

For purposes of this case it is assumed, without deciding, that in addition to its express authority to seek repayment of an improperly paid dividend the division has implicit authority to retroactively deny an application, that the division may "deny" a dividend that it has already paid (as compared with obtaining repayment), that the initial letter and the informal conference decision were "decision[s] determining [Mr. T ^ H H H M H eligibility]" within the meaning of AS 43.23.015(g), and that AS 43.23.015(g) provides statutory authority for this appeal.⁹ However, the scope of the appeal is limited to eligibility. Any other issues are outside the scope of an appeal under AS 43.23.015(g).

B. Residence

J. Date of Application

The division's informal conference decision asserts that Mr. T.'s application was complete on December 11, 2006,¹⁰ which is the date on which the division received Mr. T.'s response to the division's letter requesting supplemental information.¹¹ The division relies on 15 A A C 23.993(b)(2), which states:

- (b) For the purposes of AS 43.23.005(a) and this chapter, 'date of application' means the date on which an application for a dividend that was timely filed is complete; in this subsection, an application is

⁶ Ex. 8, p. 1 (Issue A).

⁷ Ex. 8, p. 1 (Issue A).

⁸ Ex. 8, p. 1 (Issue B).

⁹ The division did not issue an order of forfeiture or for a civil fine or loss of eligibility under AS 43.23.0235(c), and therefore AS 43.23.025(e) does not provide a basis for this appeal.

¹⁰ Exhibit 8, p. 3.

¹¹ Exhibit 3.

(2) 'complete' if it provides all information that is required by AS 43.23 and this chapter, including supplemental or additional information required by or requested under 15 A A C 23.173, that supports the applicant's claim of residence, physical presence in the state, and eligibility for the dividend.

In a recent case, the administrative law judge ruled that an application that included all the information required on the application form was not rendered incomplete when, after payment of the dividend, the division requested supplemental or additional information.¹² The facts in that case were in many respects the same as in this case: (1) an individual submitted an application that included answers to all questions; (2) the division paid the dividend based on the information in the application; (3) the division subsequently obtained information by subpoena from the applicant's bank leading the division to investigate further; (4) the division wrote to the applicant and requested the submission of supplemental information; and (5) based on the supplemental information, the division retroactively denied the application.

However, there is a key factual distinction between this case and the previous one. In the prior case, the applicants had "supplied all information requested on the application form truthfully and correctly."¹³ In this case, by contrast, the information provided on the application form was not true and correct: Mr. T. was not physically in Alaska on the date he submitted the application, and his response to the question "Are you physically in Alaska today?" was false. In the prior case, the administrative law judge concluded that it was unreasonable to interpret 15 A A C 23.993(b)(2) as extending the date for completion of an application that contains true answers to all of the questions asked.¹⁴ Whether it is unreasonable to interpret the regulation as extending the date for completion with respect to an application that contains false answers is a different question.

The application form includes four questions that may, depending on the answer, trigger a requirement for submission of supplemental information with the application. It is reasonable to interpret 15 A A C 23.993(b)(3) as presupposing true answers to those four questions: supplemental information is "required" within the meaning of 15 A A C 23.993(b)(2) if the true and correct answer to one of those four questions would trigger the requirement to submit the supplemental information. In this case, if Mr. T. provided a true answer in response to

¹² In Re D. O A H No. 08-0061-PFD (March 24, 2008).

Id., at 5.

Id.

the question regarding presence in Alaska, the application form required him to submit supplemental information. Therefore, Mr. T.'s application was not complete on January 6, 2006: it was not complete until he provided the supplemental information that was required by a true answer to the question "Are you physically in Alaska today?" Mr. T.'s application was not complete until he submitted the required supplemental information, on December 11, 2006.

2. Residence

The division's informal conference decision asserts that Mr. T. was not a state resident through December 11, 2006, because by then he was maintaining his principal home in Canada.¹⁵ This argument conflates residency with the maintenance of one's principal home. Under Alaska law, however, once Alaska residency has been established, maintenance of Alaska residency during an absence is defined without reference to the location of an individual's principal home. Many Alaska residents maintain their principal homes elsewhere while temporarily absent from the state, sometimes while absent for a reason that does not disqualify them from eligibility for a dividend, and sometimes while absent for a reason that disqualifies them from eligibility. That an individual who has established Alaska residency maintains a principal home outside of Alaska while temporarily absent from the state does not always mean that the individual is no longer an Alaska resident. Thus, to the extent that the division argues that as a matter of law a person who maintains a principal home outside of Alaska is not an Alaska resident, the division's argument is in error: Mr. T.'s status as an Alaska resident depends on whether he meets the definition of a state resident set out in the law, not on whether he maintained his principal home in another state or country.

The definition of state resident as it applies to the Alaska Permanent Fund dividend program is set out in AS 43.23.095:

(7) "state resident" means an individual who is physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055, or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055[.J

AS 01.10.055 states:

¹⁵ Exhibit 8, page 3.

(a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.

(c) A person who establishes residency in the state remains a resident during an absence from the state unless during the absence the person establishes or claims residency in another state, territory, or country, or performs other acts or is absent under circumstances that are inconsistent with the intent required under (a) of this section to remain a resident of this state.

Mr. T.'s parents moved to Alaska before statehood and his father still lives in Anchorage; Mr. T. was born in Alaska and raised in Alaska and maintained his status as an Alaska resident as an adult. After he married a Canadian citizen, he temporarily left the state to live with her at her primary residence in Canada. Through at least January 6, 2006, the preponderance of the evidence is that Mr. T. continuously maintained the intent to return to the state and remain indefinitely after a short sojourn in Canada; the foregoing circumstances, taken as a whole, are not inconsistent with the intent to return to the state and remain indefinitely.

By December 11, 2006, however, Mr. T.'s plans had changed. Mr. T.'s wife was allegedly offered "a temporary position, a very challenging career enhancement...[and the couple] postponed our return to Alaska for the duration of the temporary assignment."¹⁶ Furthermore, Mr. T. continued to live in Canada with his wife through the date the record closed in this case, January 22, 2008, more than two and one-half years after he moved into his wife's house there, and more than two years after she obtained an allegedly "temporary" job assignment there.

In this case, Mr. T. bears the burden of proving, by a preponderance of the evidence, facts sufficient to warrant a finding that through December 11, 2006, he maintained the intent to return to Alaska and remain indefinitely.¹⁷ Generally speaking, an individual who is married to a non-resident spouse must submit some documentation to substantiate the intent to return to Alaska and remain indefinitely.¹⁸ In this case, Mr. T. has not provided any evidence to support his assertion that his wife's position was temporary; he did not state the

¹⁶ Exhibit 5, page 5.

¹⁷ 15 A A C 05.030(h); 2 A A C 64.290(e).

¹⁸ 15 A A C 23.173(e).

length of time her allegedly temporary position would last or describe the couple's plans for implementing their proposed return to Alaska when it ended. Mr. T. has not described or provided evidence to establish the existence as of December 11, 2006, of any ties to Alaska other than his life-long presence in the state through October 29, 2005.¹⁹ He has not explained why, if his wife's position was temporary, the couple has remained in Canada for more than two years. Under these circumstances, Mr. T. has not met his burden of proof: he has not provided evidence sufficient to establish, in light of the circumstances as a whole, that as of December 11, 2006, he retained the intent to return to Alaska and remain here indefinitely.

IV. Conclusion

Mr. T. has failed to show that he was eligible for the 2006 dividend.²⁰

DATED May 1, 2008.

Andrew M. Hemenway
Administrative Law Judge

¹⁹ Cf. 15 A A C 23.163(g)(7).

²⁰ Because Mr. T. has not shown that he remained a resident through December 11, 2006, it is not necessary to determine whether he maintained his principal home in Canada at that time or earlier. Similarly, it is not necessary to determine whether Mr. T. intentionally provided a false and deceptive response to the question on the application regarding physical presence in Alaska on January 6, 2006.

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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of June, 2008.

By: Jerry Burnett
Director, Admin. Services

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

PFD Division
6/6/08