

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

In the Matter of	)	
M. C.	)	
	)	OAH No. 08-0011-PFD
<u>2007 Permanent Fund Dividend</u>	)	Agency No. 071589421

**DECISION & ORDER**

**I. Introduction**

M. C. timely applied for a 2007 permanent fund dividend (PFD). The PFD division determined that he was not eligible, and it denied the application initially and at the informal appeal level. Mr. C. requested a formal hearing. The formal hearing commenced February 14, 2008. The hearing was continued to provide the parties with an opportunity to resolve the matter on their own. When they could not, on April 1, 2008, a supplemental hearing was held. Throughout this matter, Mr. C. has participated in person and represented himself. PFD Specialist Susan Pollard represented the division. The division's denial of Mr. C.'s application is affirmed because he was unallowably absent from the state during the qualifying year.

**II. Facts**

At issue in this appeal is whether the division correctly counts the day an applicant returns to Alaska as a day absent from Alaska for purposes of PFD eligibility. Mr. C. traveled extensively by plane for his work in 2006. He knew he could be absent up to 180 days and remain eligible for a PFD. Mr. C. planned his travel accordingly. However, when planning his travel he was unaware that the division had a regulation, 15 AAC 23.163(j), addressing how absences were to be counted and that under that regulation that the division counted the day a person returned to Alaska as a day absent. Mr. C. counted the day of return as a non-absent day. Had he known that there was a regulation that directed how the division counted days absent, he would have planned his travel such that he would not have been absent in excess of 180 days.

On his 2007 PFD application, Mr. C. provided his dates of travel to and from Alaska.<sup>1</sup> From these dates, he calculated his total absence at 174 days. The division calculates his absence at 182 days.<sup>2</sup>

Departure Date	Return Date	Days Absent As Calculated By The Division	Day Absent As Calculated By Mr. C.
1/12/06	2/6/06	24	25
4/21/06	4/28/06	6	7
6/26/06	7/15/06	19	18
7/26/06	8/14/06	19	18
8/18/06	9/1/06	14	13
9/7/06	10/2/06	25	24
10/6/06	11/4/06	29	28
11/13/06	12/4/06	21	20
12/8/06	12/31/06 <sup>3</sup>	23	23
Total		182 Days Absent	174 Days Absent

Mr. C. agrees that if the division is correct in its application of the regulation, then he was absent in excess of 180 days. However, he challenges whether the division should apply the regulation. He asserts that it is not common knowledge and the phrase “in Alaska” for purposes of returning to Alaska is not defined. Mr. C. provided his date of return as the date his plane landed. He does not recall the approximate time of arrival at the airport.<sup>4</sup> Therefore, he believes he could have been in Alaska airspace before midnight the morning of his return and have actually returned to Alaska a day earlier than he reported.

### III. Discussion

The qualifying year for the 2007 dividend was 2006.<sup>5</sup> A PFD applicant must meet several eligibility requirements.<sup>6</sup> One of the eligibility requirements is that a person must have been physically present in Alaska throughout the qualifying year, or only absent as allowed by

<sup>1</sup> Exhibit 1, at 3.

<sup>2</sup> Exhibit 9, at 1.

<sup>3</sup> Mr. C. did not return to Alaska until 2007.

<sup>4</sup> At the April 1, 2008, hearing, Mr. C. requested a third opportunity to establish the specific time he entered Alaskan airspace. The April 1, 2008, hearing was Mr. C.’s second hearing on his appeal and second opportunity to present evidence. Throughout the formal hearing process the division consistently held the position that the day of return is counted as a day absent. *See e.g.*, Division Position Statement. Mr. C. was not seeking an opportunity to gather evidence in support of a new reason for denial by the division. Thus, Mr. C.’s request for a third opportunity to present evidence in support of his position that he was not absent in excess of 180 days was denied.

<sup>5</sup> AS 43.23.095(5).

<sup>6</sup> AS 43.23.005

AS 43.23.008.<sup>7</sup> Under AS 43.23.008(a)(16)(A), a person may be allowably absent up to 180 days. An applicant who is otherwise eligible for a dividend but is absent from Alaska for more than 180 days during the qualifying year, loses that eligibility.<sup>8</sup>

Under 15 AAC 23.163(j), the division must “count whole days when determining the number of days an individual was absent from Alaska” and it must “count the day an individual arrives or returns to Alaska as a day absent unless the individual previously left Alaska that same day.” When an applicant returns to Alaska is a question of fact to be resolved on a case by case basis; therefore, the phrase “in Alaska” need not be defined by regulation.

Conversely, how the number of days absent is counted is not a factual question and is defined by regulation. The Department of Revenue has promulgated regulations that provide guidance to the division when it is calculating the number days an individual is absent from the state.<sup>9</sup> The statutes and regulations addressing PFD eligibility are available on the State of Alaska website. The PFD division has technicians who can assist applicants over the phone. Mr. C. knew he could not be absent in excess of 180 days. He planned his travel such that he believed his absences would be allowable. Mr. C. testified credibly that had he been aware of how the dates were calculated he would have changed his travel plans; however, it was incumbent upon him to inquire whether the day of arrival was counted as a day absent. The division has no discretion in its application of 15 AAC 23.163(j). While this rigidity in application is sometimes frustrating, it does promote the consistent administration of a program with many beneficiaries. The day that an individual leaves Alaska is not counted as a day of absence under 15 AAC 23.163(j). Mr. C. should not have been too surprised to discover that that if one leaves the state on one day and returns on the next it counts as a one-day absence from Alaska under the PFD eligibility regulations.

As the appellant, Mr. C. has the burden of proving by a preponderance of the evidence when he returned to Alaska.<sup>10</sup> “To prove a fact by a preponderance of the evidence, a party with the burden of proof must show that the fact more likely than not is true.”<sup>11</sup> Mr. C. was provided with two opportunities to present evidence in support of his appeal. He has not presented

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<sup>7</sup> AS 43.23.005(a)(6).

<sup>8</sup> Combined absences not exceeding 180 days are an allowable absence. AS 43.23.008(a)(16)(A). In certain circumstances, not present here, the 180 days may be combined with other allowable absences to exceed 180 days. *See id.*

<sup>9</sup> 15 AAC 23.163(j).

<sup>10</sup> 15 AAC 05.030(h); 2 AAC 64.290(e).

<sup>11</sup> 2 AAC 64.290(e).

persuasive evidence that any plane he flew in crossed the Alaska border before the dates provided on his PFD application. Therefore, Mr. C. has failed to prove that it is more likely than not that he was allowably absent, i.e.: absent for 180 days or less; therefore, the decision of the division should be affirmed.

#### **IV. Conclusion**

Because of a disqualifying absence during the qualifying year, Mr. C. is not eligible for a 2007 PFD. He remained an Alaska resident in 2006, and nothing in this decision precludes him from eligibility for future PFDs.

DATED this 8<sup>th</sup> day of April, 2008.

By: Signed  
Rebecca L. Pauli  
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 5<sup>th</sup> day of May, 2008.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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