

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

IN THE MATTER OF)
)
 K. Z.)
) Case No. OAH 08-0163-PFD
)
2007 Permanent Fund Dividend)

DECISION

I. Introduction

K. Z. timely applied for a 2007 permanent fund dividend. The Permanent Fund Dividend Division determined that Mr. Z. was not eligible, and it denied the application initially and at the informal appeal level. Mr. Z. requested a formal hearing. Administrative Law Judge Dale Whitney heard the appeal on May 5, 2008. Mr. Z. appeared by telephone. PFD Specialist Kim Colby represented the PFD Division.

Because Mr. Z. was not an Alaska resident on his “date of application,” he is not eligible for a 2007 dividend.

II. Facts

The facts stated below are based on Mr. Z.’s testimony, which carried an uncommon air of frankness, credibility and sincerity. Mr. Z. was a member of the Alaska National Guard living in Juneau when he was deployed for active duty in Iraq. Mr. Z. left Juneau for Iraq under orders from the State of Alaska in the latter part of 2006. In spite of a disability, Mr. Z.’s wife did her best to take care of herself and their daughter, who is also disabled, in Mr. Z.’s absence. The family’s experience in Mr. Z.’s absence appears to have been tinged with trauma due to a criminal event affecting Mr. Z.’s daughter. Mr. Z. returned to Alaska from Iraq on November 1, 2007. Sizing up the situation on his return to Juneau, Mr. Z. determined almost immediately that, due to events that had transpired in his absence, his family was no longer safe in Juneau, particularly since Mr. Z. planned to volunteer for another deployment. From the time Mr. Z. got home on November 1, 2007, it took the family about forty-eight hours to make a decision to leave Juneau. Having made up their minds, the family wasted no time, and they left with their belongings on the next ferry to Bellingham on November 5, 2007.

On December 12, 2007, Mr. Z. purchased a home in Washington State, where he has relatives who could help and support his wife and daughter during Mr. Z.’s next deployment. Mr.

Z. is attached to the Washington National Guard, and received orders for another mission to Iraq starting in July, 2008.

While he was in Iraq, Mr. Z.'s wife filled out a paper application for each member of the family and submitted it before March 31, 2007, signing her own name on Mr. Z.'s application. Mr. Z. testified that he was also given an application by his "chain of command" while he was in Iraq, and that he completed all the forms and returned them to the chain of command. Mr. Z. testified that he does not know what happened to the application form he completed; it does not appear to be in the division's possession. Mr. Z. testified that before he deployed he had completed a standard power of attorney for his wife, as directed by the military, but it was his understanding that there had been some uncertainty as to whether the power of attorney allowed her to file a PFD application on his behalf.

When she filled out Mr. Z.'s application, Ms. Z. initially indicated that Mr. Z. was physically present in Alaska. She then crossed out that answer and filled in the bubble indicating that Mr. Z. was not in the state. She did not, however follow the directions to "complete Question 8 on the back of this form and Parts B & C of the adult supplemental schedule and attach it to this completed application." The division sent a letter requesting the supplemental schedule, but Ms. Z. did not respond, and the division denied the application on May 16, 2007. Ms. Z. requested an informal appeal, and she attached a valid power of attorney form. Ms. Z. stated that she had been looking for the power of attorney form before acting on Mr. Z.'s behalf, and had just located it. However, Ms. Z. did not respond to the division's requests for further information, including the supplemental schedule. On October 8, 2007, the division affirmed its decision to deny the application because the application was still incomplete.

After getting his family settled in Washington, Mr. Z. began addressing the less pressing matters that had accumulated during his deployment to Iraq. Mr. Z. requested a formal hearing early in 2008, and at that time he provided all the requested information, including the supplemental schedule. This information satisfied the division that Mr. Z. had met all eligibility requirements, up until the time he decided to move to Washington some time in the first week of November, 2007.

III. Discussion

According to AS 43.23.005(a), "an individual is eligible to receive one permanent fund dividend each year...if the individual...is a state resident on the date of application..." The division received paper applications for each member of the Z. family before the March 31 deadline. There is no dispute that at that time, everyone in the family was an Alaska resident and

that Mr. Z.'s absence was allowable. The division granted the applications for Mr. Z.'s wife and daughter.

When she filled out Mr. Z.'s application, Ms. Z. initially indicated that Mr. Z. was physically present in Alaska. She then crossed out that answer and filled in the bubble indicating that Mr. Z. was not in the state. She did not, however follow the directions on the application form to complete a supplemental schedule. It was a minor oversight, and one that a person could normally correct in order to receive a dividend.

The difficulty in this case arises out of one of the PFD regulations, 15 AAC 23.993(b), which reads in part:

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

While appearing as merely a definition supplementing a statute, 15 AAC 23.993(b) increases the number of applicants who will not qualify for dividends, in spite of meeting all of the statutory and regulatory eligibility requirements at the time they filed their applications during the application period. The eligibility statute, AS 43.23.005, only requires applicants to be state residents on the "date of application." If the date of application were the date a person files an application form, the statute would appear to mean that besides being a resident all through the qualifying year, the applicant must still be a resident at the time the person claims a dividend between January 1 and March 31 of the dividend year. Thus, the statute requires at the least Alaska residency for a period of from one year and one day to one year and three months, depending on when the applicant files an application.

The division's regulation, 15 AAC 23.993(b), establishes that the "date of application" is not the day the person submits an application, but rather is the last day on which a person submits necessary supporting information. Mr. Z. did not submit his supplemental schedule until early in 2008, well after he ceased to be an Alaska resident. Thus, under the regulation, Mr. Z. was not an Alaska resident on his "date of application" for a 2007 dividend. If the regulation is valid, Mr. Z. is not eligible for a dividend, even though his wife and daughter are eligible under nearly identical circumstances.

The regulation has the effect of expanding the time during which a person must be an Alaska resident from a maximum of one year and three months to one year plus the open-ended

period of time that is required for the division to investigate, ask questions, and pursue additional supplemental information. Answers to questions can trigger more questions, and theoretically this process could go on indefinitely; in some circumstances certain persons could need to be Alaska residents for much more than a year and three months to qualify for a dividend.

In addition to expanding the group of applicants who are ineligible because of the expanded residency requirement, the regulation also expands the group of applicants who are ineligible for other reasons. Another regulation, 15 AAC 23.143(d), lists a number of actions, such as registering to vote in another state or getting a resident fishing license in another state, that will disqualify an applicant if taken during the qualifying year or before the “date of application.” For example, if an applicant applies for a dividend on March 31, 2008, registers to vote in another state during a college voter registration drive on May 1, 2008, and then provides proof to the division on June 1, 2008, that the person is actually a full-time student who is allowably absent, the applicant will not be eligible for a 2008 dividend because the person registered to vote before the “date of application.” This is true even if the applicant remained an Alaska resident at all times. The applicant will also not be eligible for a 2009 dividend, because the person registered to vote during the qualifying year for that dividend. Thus, because of the regulatory definition of “date of application,” some Alaska residents who take certain disqualifying actions will lose two dividends instead of one, even though the person is eligible for one of the dividends under the other regulations, and for both dividends under the statutory criteria.

If the division had granted Mr. Z.’s application and later decided that Mr. Z. was ineligible, or if the division had denied Mr. Z.’s application based on a finding that he did not meet eligibility criteria, it would be easy to determine that Mr. Z.’s application was “complete” at the time the division made a decision.¹ Regardless of whether the applicant has submitted everything the division has requested, if the division is able to make a decision either way regarding eligibility, an application must be considered complete. Mr. Z.’s case is distinguishable from a case in which an eligibility decision has been made; Mr. Z.’s application was denied for the sole reason that the application was incomplete.

The Supreme Court has stated that

we agree that the commissioner has the authority to promulgate a regulation excluding permanent fund dividend applicants who arguably fall within the statutory definition of

¹ See, e.g., OAH case # 08-0061-PFD (2008).
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eligible applicants. That exclusion, however, must still be consistent with the statutory purpose and “reasonable and not arbitrary.”²

Three main statutory purposes underlie the PFD program:

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.³

In addition to these three purposes, the court has approved of regulations that are rationally related to the goals of limiting dividends to state residents,⁴ and regulations designed “to ease the administrative burden of attempting to determine what treatment level is sufficient to merit eligibility for a PFD”.⁵ In order to be valid, the regulation defining “date of application” must be rationally related to one of these purposes.

It is difficult to imagine how the regulatory definition eases the division’s administrative burden; in most cases, expanding the period in which all other eligibility requirements apply would seem to increase the administrative burden. The regulation does not serve to limit dividends to people who are state residents during the statutory application period of January 1 through March 31 of the dividend year, but it does prevent issuance of dividends to some people who later cease to be state residents.

Regulations are presumed to be valid and are entitled to deference.⁶ The Supreme Court has not addressed whether 15 AAC 23.993(b) might violate constitutional standards of reasonableness or arbitrariness, whether creation of an open-ended residency requirement exceeds the commissioner’s statutory authority, or whether an open-ended residency requirement extending

² *State, Dept. of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 625 (Alaska 1993).

³ *Id.* at 627.

⁴ *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728, 732 (Alaska 1995).

⁵ *Id.*

⁶ *Cosio* at 624.

beyond the statutory application period would violate constitutional guarantees of equal protection and interstate travel.⁷ Until the courts reach such a decision, the regulation should be given effect.

IV. Conclusion

Because Mr. Z. was not an Alaska resident on his “date of application” as defined in 15 AAC 23.993(b), the division’s decision to deny Mr. Z.’s application for a 2007 permanent fund dividend is AFFIRMED.

DATED this 30th day of October, 2008.

By: Signed
DALE WHITNEY
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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 2nd day of December, 2008.

By: Signed
Signature
Jerry Burnett
Name
Acting Deputy Commissioner
Title

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

⁷ It is difficult to say at what point a durational residency requirement would be of too great a duration to survive a constitutional challenge. The Alaska Supreme Court observed that a one-year residency requirement to file a divorce action was found not to violate the right of interstate travel by the United States Supreme Court, while the Alaska court struck down a similar requirement. *Williams v. Zobel* (“*Zobel II*”), 619 P.2d 448, 452 (Alaska 1980), citing *Sosna v. Iowa*, 419 U.S. 393 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) and *State v. Adams*, 522 P.2d 1125 (Alaska 1974). In *Zobel* the Alaska court approved a scheme for varying dividend amounts depending on length of Alaska residency; the U.S. Supreme Court overturned the case on the grounds that the scheme violated federal equal protection guarantees. *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d. 672 (1982).