

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

IN THE MATTER OF)	
)	
I., P., B., M.,)	
K. & L. H.)	
)	
<u>2006 & 2007 Permanent Fund Dividends</u>)	OAH No. 08-0210-PFD Agency No. 2006-059-9141

DECISION AND ORDER

I. Introduction

This case relates to the 2006 and 2007 Permanent Fund Dividends (PFDs) of I. and P. H. and their four children, for which the family submitted applications during the appropriate application periods. The Permanent Fund Dividend Division determined that the H.s were not eligible, and it denied the applications initially and at the informal appeal level. Ms. and Mr. H. requested a formal hearing. After a number of consensual delays while the H.s pursued a Superior Court appeal of an adverse decision on their 2005 dividends, this case went to hearing on September 10, 2009. The record remained open through October 21, 2009 to allow the parties to submit supplemental materials they wished to have considered.

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 2006 and 2007 dividends 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 June 24, 2006, too late to be eligible for the dividends at issue in this appeal.

II. Facts

A. Residence History

The findings of fact below are based on the hearing testimony of I. and P. H. except where otherwise attributed.

I. H. enlisted in the Navy in 1985 and served until 2005. He and P. H. first moved to Alaska in 1987, after I. H. requested and received a military posting in Adak. P. H. worked in Adak as a teacher.

Adak was an unpopular posting for Naval personnel, and it was unusual to request extensions. The H.s, however, were fond of the island and requested three extensions. The last of the extensions was obtained at some cost to Mr. H.'s career, and was granted only on condition that he must rotate to another posting when that extension expired. Accordingly, in June of 1992 the H.s were required to move to a Naval installation in another state.

In 1994 Mr. H. took leave to Adak, a highly unusual use of Navy leave. Later that year, he applied for and obtained a posting to the island from September to December in connection with the winding down of the base there.¹

I. H. was ordered to Iceland from July of 1997 to November of 1998. He moved there with his family, which now included three children. He was permitted no leave while in Iceland.

From November of 1998 to December of 2003, Mr. H. was posted to England, again with his family. By now, he was a senior enlisted man and was looking out for the junior personnel under his supervision to make sure they received adequate leave. Further, his leave was subject to the restriction that it be used locally when that was necessary to be sure he would be available on short notice if needed. Between November of 1998 and September of 2001, Mr. H. was able to take only two non-local leaves. One was an emergency leave to care for a parent. The second leave was used to travel to Alaska.

As of September 11, 2001, Mr. H. had another leave to Alaska set up. The events of that day caused his leave to be canceled. Although he was subsequently permitted to take some local leave, he was not able to schedule another leave back to the United States before the end of his tour in December of 2003. He forfeited 35 days of leave during this period due to carryover limits.

In December, 2003, Mr. H. requested and obtained a posting to No Name Island, Washington, the closest significant Naval facility to Alaska at that time. He was within

¹ Adak went onto the Department of Defense closure list in 1993.

two years of getting out of the Navy, and he wanted to be as close to Alaska as possible when that occurred. Under Navy policy, he was permitted no leave for his first six months at the new location. He scheduled a leave for August of 2004 to go to Alaska with his wife to investigate employment, but that leave was cancelled when his command lost personnel and he was needed to cover for them. He was able to make a brief visit to Alaska in early December of 2004. This was the only leave he was able to take during his nearly two years at No Name Island.

In the spring of 2005, Mr. H. put in his retirement paperwork, requesting shipment to Alaska. His retirement date was to be December of 2005. However, due to budget cuts his retirement was abruptly moved up to September, causing him to lose 90 days of accrued leave and causing other financial hardship. For this and other reasons, including medical care, his move to Alaska was somewhat delayed; the family arrived in the state in June of 2006.² They have remained as residents ever since.

During their postings to other states and countries, the H.s maintained extensive ties to Alaska even though doing so was sometimes expensive. Mrs. H. maintained her Alaska teaching certificate despite the difficulty of obtaining the necessary continuing education while overseas. When the H.s were in Washington, she homeschooled her children but declined the financial curriculum support and sports programs available to Washington residents, instead spending \$5000 per year to purchase the materials herself. On the other hand, the H.s' financial sacrifice has been compensated to some degree. During a portion of the period when they were deemed ineligible for PFDs, they were able to receive a financial benefit of Alaska residency: eligibility for in-state tuition for a daughter at the University of Alaska.

Apart from the paucity of their visits to Alaska, there is no evidence in the record that the H.s have ever taken a step inconsistent with maintaining an intent to return to the state and remain indefinitely. However, infrequency of visits is an important factor in evaluating residency and PFD eligibility, and it played a role in later proceedings as discussed in B below.

² Mr. H. was questioned about he reasons for this delay at the hearing, but he elected to supply only a minimal explanation.

B. Application and Adjudication History

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' 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. An appeal to this office followed. The denial was affirmed on the basis that 2003 decision established, through the legal doctrine of collateral estoppel, that the H.s were not Alaska residents in 2002.⁷ With that fact conclusively established, it was impossible for the H.s to establish residency for any succeeding year until they physically returned to Alaska for at least some period of time, which the H.s did not do until after the qualifying year for the 2005 dividend had already begun.⁸ The decision regarding the 2005

³ See Ex. 24 at 1-5 (2001 Denial Letters); see also Alaska Regulation 15 AAC 23.163(f), (h)(2).

⁴ Ex. 24 at 42-44 (*In re H.*, Caseload No. 020683, adopted 2003).

⁵ Ex. 27 at 38-42 (*In re H.*, OAH No. 06-0567-PFD, adopted 2007).

⁶ *Id.* at 2 & n.6.

⁷ *Id.* at 3-4.

⁸ *Id.* at 4.

dividend has been affirmed by the Superior Court, and is currently before the Alaska Supreme Court.

The H.s' 2006 and 2007 applications are the ones at issue in the present case. These applications were denied on the basis that the H.s had lost their residency as described above, and did not return to Alaska until June 24, 2006, which is after the qualifying year for the 2006 dividend had expired and after the qualifying year for the 2007 dividend had begun (so that neither could be a complete qualifying year for the H.s).⁹ These denials have been sustained on informal appeal. The informal appeal decisions implicitly acknowledge that the H.s did return to Alaska briefly in 2004, but reason that they did not take the requisite "one step beyond" physical presence to successfully reestablish residence at that time.¹⁰

III. Discussion

In this appeal, the H.s have the burden of proving that the PFD denials they have challenged are incorrect.¹¹ Insofar as certain issues are conclusively established by prior proceedings, they cannot meet their burden by making a collateral attack on those prior determinations.

A. Effect of 2003 Ruling

In order to qualify for a PFD, an individual must be an Alaska resident for all of the PFD qualifying year.¹² An individual can remain an Alaska resident while living outside Alaska under some circumstances, such as active-duty military service or status as a military dependent, if the individual maintains at all times the intent to return to Alaska and remain indefinitely.¹³

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

⁹ Ex. 3 and 11 (Denial Letters).

¹⁰ See Ex. 9 and 19 (Informal Appeal Decisions). This is a reference to 15 AAC 23.143(c), a regulation not relied upon in the present decision.

¹¹ 15 AAC 05.030(h); see also 15 AAC 23.173(i).

¹² Alaska Statute (AS) 43.23.005(a)(3).

¹³ AS 01.10.055(c) & AS 43.23.008(a)(3).

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.¹⁴ 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.¹⁵ 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.”¹⁶

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 established, for purposes of all subsequent proceedings, that the H.s were not Alaska residents in 2002. The decision was conclusive because of a doctrine called collateral estoppel, designed to prevent people from wasting resources by litigating issues over and 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.¹⁷ 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

¹⁴ 15 AAC 23.163(f).

¹⁵ *In re R.*, OAH No. 06-0530-PFD (2006).

¹⁶ 15 AAC 23.163(h)(2).

¹⁷ *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).

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.

Because the September 16, 2003 decision established that the H.s were not Alaska residents in 2002, 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.”¹⁸ 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.¹⁹ For purposes of the 2005 dividend (resolved in the prior ruling that is now before the Supreme Court), that was the end of the matter. It was 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 already almost over. This meant that they could not legally be considered 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.”²⁰ Since the H.s were not state residents when the qualifying year for the 2005 dividend began, they were not eligible for that dividend.

B. Reestablishment of Residency

The qualifying year for the 2006 dividend was 2005, and for the 2007 dividend the qualifying year was 2006.²¹ Before either of those qualifying years began, Mr. and Mrs. H. returned to Alaska for the second week of December, 2004. This physical presence prior to the qualifying year distinguishes the present appeal from the appeal of the 2005 dividend. With physical presence, it is possible to reestablish residency.

Alaska’s general status on residency provides that “a person establishes residency in the state by being physically present in the state with intent to remain indefinitely and

¹⁸ Alaska Statute 01.10.055(a).

¹⁹ 15 AAC 23.143(b).

²⁰ AS 43.23.005(a)(3) (italics added).

²¹ AS 43.23.095(6).

to make a home in the state.”²² The necessary intent is demonstrated by doing two things:

- (1) by maintaining a principal place of abode in the state for at least 30 days or for a longer period if a longer period is required by law or regulation; and
- (2) by providing other proof of intent as may be required by law or regulation, which may include proof that the person is not claiming residency outside the state or obtaining benefits under a claim of residency outside the state.²³

Thus, one can under no circumstances demonstrate residency without, at a minimum, “maintaining a principal place of abode in the state for at least 30 days.”²⁴

When the H.s came to Alaska for a week in late 2004, they appear to have had the intent to make Alaska their home in the long run. Nonetheless, their principal place of abode remained in No Name Island, where they returned for the next year and a half. This means they did not establish a new Alaska residency during that visit.

The H.s next came to Alaska on June 24, 2006. There is no dispute that, to the extent that they had lost residency, they reestablished it at that time. Regrettably, this was too late to permit them to be residents for the entirety of either qualifying year for the dividends at issue in the present case.

C. The H.s’ Concerns About the Handling of Their Applications

The H.s feel the Division has been unwilling to consider the substantial evidence of their affection for, and intent to return to, Alaska, and of their careful maintenance of traditional ties to the state during their long absence. What the H.s have not recognized, however, is that neither the Division nor the Office of Administrative Hearings is writing on a clean slate. The H.s had an opportunity to contest the residency issue in the 2003 appeal. To the extent that they pursued that appeal, they lost it. This had consequences. It established for all future proceedings that they were not, in the year addressed by that appeal, Alaska residents. At that point, it became impossible for the H.s to qualify for

²² AS 01.10.055(a).

²³ AS 01.10.055(b).

²⁴ Cf. *R.C.H. v. State, Dep’t of Revenue*, No. 4FA-08-0000 CI (Alaska Superior Ct. May 11, 2009), Memorandum & Order at 13 (“For most purposes, a person . . . needs to be an Alaska resident for thirty (30) days” to establish residency) (<http://aws.state.ak.us/officeofadminhearings/Documents/PFD/PFD070677%20Superior%20Court%20Decision.pdf>).

later PFDs without returning to the state for a significant period to re-start their residency. The lack of attention to the H.s' actions after that time does not stem from bias or animosity toward the H.s, but rather grows out of the fact that those actions became legally irrelevant.

IV. Conclusion

Because a 2003 appeal decision establishes that the H.s were not Alaska residents after 2001, and because they did not return to Alaska for the requisite 30 days needed to reestablish residency before the qualifying years for the 2006 and 2007 dividend began, they are not eligible for the those dividends. The decision of the Permanent Fund Dividend Division to deny the applications of I. E. H., P. L. H., and B., M., K., and L. H. for 2006 and 2007 Permanent Fund Dividends is AFFIRMED.

DATED this 30th day of November, 2009.

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 4th day of January, 2010.

By: Signed
Signature
Ginger Blaisdell
Name
Director, Administrative Services Division
Title

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