

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

In the Matter of)	
)	
D. R. W.)	
)	OAH No. 08-0253-PFD
<u>2006 Permanent Fund Dividend</u>)	Agency No. 2006-059-6274

DECISION & ORDER

I. Introduction

D. R. W. received a 2006 permanent fund dividend (PFD) in the ordinary manner. In May of 2007 the Permanent Fund Dividend Division denied the dividend retrospectively and assessed the payment, seeking reimbursement of \$1,106.96 from Mr. W. The basis for the assessment was the fact that Mr. W. had checked the “no” box on a jury service questionnaire next to the statement “I am an Alaska resident.”

A formal hearing took place on July 1, 2008, with Mr. W. representing himself and Kimberly Colby appearing for the division. The evidence at the formal hearing showed that the assessment of the 2006 dividend should be abated as an exercise of the enforcement discretion expressly granted to the Department of Revenue by statute and regulation.

II. Facts¹

D. and M. W. moved to Alaska 27 years ago and received permanent fund dividends from the inception of the program. D. W. was in the military in his early years in the state, and then held a civilian job for many years. He performed jury duty in Alaska on a number of occasions. M. W. has continued for 27 years in a military career, and in 2005 was a Major in the Air National Guard. Both Mr. W. and Major W. spent 2005, the qualifying year for the 2006 dividend, in Alaska.

In December of 2005, Major W. received orders to take an active-duty post at Andrews Air Force Base in Maryland for a fixed tour of 48 months.² The W.s left Alaska on January 8, 2006.³

Mr. W. applied for a PFD on March 26, 2006, duly reporting on his application his absence to accompany his spouse.⁴ The PFD Division paid the dividend. The Division

¹ The only testimony offered at the brief hearing was that of Mr. W. and his wife, Major M. W. All facts found below are based wholly or in part on that testimony; when there is an additional documentary source, it has been cited in a footnote.

² Exhibit 1, p. 6 (Special Order, Dec. 14, 2005).

subsequently learned that on February 9, 2006—after leaving the state but before sending in his PFD application—Mr. W. had marked the “no” box on a jury service questionnaire next to the statement “I am an Alaska resident.” On May 14, 2007 the Division issued a “Notice of Denial and Assessment” to Mr. W. for the 2006 dividend.⁵ The election to assess the dividends remained unchanged through the informal appeal process.⁶ This formal appeal followed.

This case turns on the circumstances under which Mr. W. marked the “no” box indicating non-residency. When he marked the box, Mr. W. was maintaining his principal place of residence in another state with the expectation of returning in January of 2010. The jury questionnaire postcard Mr. W. received had 12 yes or no questions.⁷ Mr. W., who had served on a number of Alaska juries, knew these questions would be used to determine whether he should be excused from service. He searched the form for one that would convey his situation, and settled on question 5: answering “no” to the statement “I am an Alaska resident.” In doing so he meant to convey, “I’m not there” or “I do not reside in Alaska at this time.” Only one other question among the 12 potentially relates to absence from the state. That is item 9: “I wish to reschedule my jury service to another time within the next 10 months. If yes, write a new date in #9 on the back of this form.” That item did not assist Mr. W. because he could not serve on a jury in the next 10 months. The form does not contain an item corresponding to extended temporary absences such as those in connection with military service, and does not have a blank for open-ended explanations of inability to serve.

III. Discussion

A. Discretion

Assessment of a PFD that has already been paid, but paid in error, is a matter of discretion. Alaska Statute 43.23.035(b) provides that if the commissioner determines that a dividend should not have been paid, he “may” recover the payment. Likewise, 15 AAC 23.233(a) permits the department “in its discretion” to elect to take steps to recover a dividend paid to an individual who was not eligible. While in many cases it will be good policy to recover dividends that have been paid in error, the department is never compelled by law to do so.

³ Exhibit 1, p. 2 (2006 Adult Application).

⁴ *Id.* at 1-2. AS 43.23.008 preserves the eligibility of legal residents of the state who are absent accompanying an eligible spouse who is absent for active-duty military service.

⁵ Exhibit 3.

⁶ Exhibit 5.

⁷ Exhibit 2 (Jury Questionnaire).

B. Assessment of 2006 Dividend

15 AAC 23.143(d)(16) disqualifies an individual from a dividend if the individual, at any time from January 1 of the qualifying year through the date of application—in this case, in the span from January 1, 2005 through March 26, 2006—has “claimed to be unavailable for Alaska jury duty service because the individual was not a resident.” The intent of this regulation is presumably to screen out applicants who avoid jury service by claiming not to be legal residents of the state.

Mr. W. credibly testified that his mark on the jury questionnaire was not intended to convey that he was not a legal resident. Instead, he was indicating only that he did not reside in Alaska in 2006. This interpretation of the jury questionnaire was reasonable and understandable. The questionnaire is designed in such a way that the box Mr. W. checked was indeed the option, of the limited array he was offered, that most correctly described his situation.

Mr. W. did not misrepresent what he had done when he later applied for a 2006 PFD. Although the 2006 PFD application contained a number of specific questions aimed at the particular disqualifying acts listed in 15 AAC 23.143(d), it contained no question corresponding to 15 AAC 23.143(d)(16).⁸

In past cases involving whether to assess a paid dividend for repayment, the Department of Revenue has considered surrounding circumstances including:

- (1) the passage of time since the dividend was paid;
- (2) whether there is room for argument that the applicant’s action was not legally disqualifying;
- (3) whether the applicant erroneously reported the disqualifying information on the PFD application;
- (4) whether the applicant should have known at the time of application that he or she was ineligible; and
- (5) whether the applicant received a financial benefit from the allegedly disqualifying act.⁹

⁸ Exhibit 1, p. 4.

⁹ See *In re E.L.K.*, OAH No. 06-0785-PFD (Dept. of Revenue 2007) (factors 2, 3, and 4 weighed against applicant; assessment upheld); *In re R.E.*, OAH No. 06-0385-PFD (Dept. of Revenue 2006) (where factors 1 and 3 favored the applicant but 2, 4, and 5 weighed against, case close but assessment upheld in deference to PFD Division’s judgment to assess; for other dividends where there was uncertainty under 2 and 4 and no benefit under 5, assessment overturned).

Here, these factors generally cut in favor of Mr. W. It is nearly two years since the dividend was paid. The ambiguity of the jury questionnaire and its lack of an appropriate choice for servicepeople and dependents in Mr. W.' position makes it debatable whether his act should be construed as disqualifying under 15 AAC 23.143(d)(16), and under the circumstances one cannot say he should have known he was ineligible. He did not erroneously report the event on his application. He got no financial benefit from the way he filled out his jury questionnaire. In these circumstances, the department should use its discretion not to disturb the dividend.

IV. Conclusion

The Department ought not to require repayment of the dividend it paid to Mr. W. in 2006.

V. Order

IT IS HEREBY ORDERED that the assessment of the previously paid 2006 permanent fund dividend to D. R. W. be ABATED.

DATED this 2nd day of July, 2008.

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 29th day of July, 2008.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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