

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

In the Matter of:	)	
	)	
J M. B	)	
	)	OAH No. 08-0293-PFD
<u>2007 Permanent Fund Dividend</u>	)	Agency No. 2007-055-1630

**DECISION AND ORDER**

**I. Introduction**

J M. B moved to Alaska in September of 2005. 147 days later he was ordered to an out-of-state location on military duty. He had two extended absences for this duty during the qualifying year for the 2007 permanent fund dividend (PFD). When he later applied for the 2007 PFD, the Permanent Fund Dividend Division denied his application initially and at the informal appeal level on the basis of that he had not been an Alaska resident for six months before leaving on his military-related absences. At Mr. B's request, a formal hearing was held on July 29, 2008.<sup>1</sup>

The division's denial is reversed because the length and sequence of Mr. B's absences is such that they did not disqualify him from dividend eligibility.

**II. Facts**

The facts of this case are not in dispute. During the hearing, Mr. B confirmed that the table in the Division's position statement of July 23, 2008 correctly summarizes the travel dates that are the key to resolving this case.

J B's most recent Alaska residency began on September 1, 2005, when he and his family physically moved to the state and he applied to change his State of Legal Residence in his military records to Alaska.<sup>2</sup> On January 26, 2006, after 147 days in the state, he traveled on military orders to attend training in South Carolina.<sup>3</sup> He returned to Alaska on May 27, 2006, after an absence of 121 days. Eighteen days later, on June 14, 2006, he was deployed to Afghanistan, where he remained for 187 days, returning to Alaska on December 18, 2006. He remained in Alaska through the end of 2006. During both absences in 2006 he was serving on active duty in the armed forces.

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<sup>1</sup> During the hearing, Mr. B offered to supply additional legal authority on an issue of federal law that he raised. Because this case has been addressed in a way that makes it unnecessary to consider the federal issue, a proposed decision has been issued without waiting for Mr. B's supplemental material.

<sup>2</sup> See Exhibit A (State of Legal Residence Certificate).

<sup>3</sup> Exhibit 7, p. 4 (orders).

Before Mr. B left for Afghanistan, he had a total of 165 days of physical presence in Alaska. It had been 286 days since he moved to Alaska.

### **III. Discussion**

Mr. B spent most of 2006, the qualifying year for the 2007 dividend, on military duty outside Alaska. It is possible to retain PFD eligibility while living in another state or country during the qualifying year, but eligibility is only retained if one is absent for certain reasons listed in Alaska Statute 43.23.008.

One of the permissible reasons is found in AS 43.23.008(a)(16): “any reason consistent with the individual’s intent to remain a state resident.” The statute sets time limits on this kind of absence. For someone claiming no other allowable absences, or claiming another absence for military service as outlined below, the limit is 180 days.<sup>4</sup> Hence AS 43.23.008(a)(16) is available to render Mr. B’s first absence allowable—the one of only 121 days to attend training in South Carolina—but cannot apply to his second absence since that absence exceeded 180 days.

The second permissible reason relevant to this case is found in AS 43.23.008(a)(3): absence while serving on active duty in, or accompanying as spouse or dependent someone on active duty in, the armed forces of the United States. This is the allowable absence on which Mr. B must rely to maintain eligibility notwithstanding his 187-day absence in Afghanistan. However, in order to take advantage of an allowable absence for military duty, the Legislature has required that the applicant must have been “a resident of the state for at least six consecutive months immediately before leaving the state.”<sup>5</sup> There is no exception for involuntary absences.

There can be no dispute that, because of this restriction, absence (a)(3) cannot apply to Mr. B’s first out-of-state duty, since it began less than six months after his state residency first began. However, as noted above, he does not need absence (a)(3) to cover his first posting because absence (a)(16), the catchall provision, is sufficient to make that 121-day absence allowable.

The more difficult question is whether absence (a)(3) can apply to the 187-day Afghanistan deployment. At the hearing, the division contended that it cannot, relying on a textual analysis of AS 43.23.008(b).

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<sup>4</sup> AS 43.23.008(a)(16)(A).

<sup>5</sup> AS 43.23.008(b).

Quoted in full, AS 43.23.008(b) reads:

An individual may not claim an allowable absence under (a)(1) – (15) of this section unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state.

The phrase “resident of the state” appears on its face to be equivalent to “state resident,” a formulation the Legislature has defined in AS 43.23.095(7). The definition does not require continuous physical presence in the state. Instead, provided one has established residency by once being physically present in Alaska, the residency can continue during an absence if the person “intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055.” Alaska Statute 01.10.055 likewise contemplates continuing Alaska residency for absent people, provided they have the intent referenced in AS 43.23.095(7) and provided they do not take actions inconsistent with Alaska residency, such as claiming residency somewhere else.

Although the Division agrees that residency as a legal concept does not ordinarily require constant physical presence, the Division’s view is that when the Legislature used the word “resident” in AS 43.23.008(b) it meant, in that particular instance, that the person must be physically present in the state. It argues that this reading is compelled by the phrase “before leaving the state.” The Division theorizes that this phrasing shows that the Legislature meant to require that the person not have been outside the state (not have “[left] the state”) for the six consecutive months before the absence in question. Based on this reading of the statute, the Division contends that Mr. B’s first absence in 2006—though allowable under AS 43.23.008(16) and therefore not disqualifying in itself—prevented him from accruing the necessary six months as a “resident,” at that term in used in AS 43.23.008(b), to permit him to use AS 43.23.008(3) for his second absence.

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For two reasons, the Division’s reading of AS 43.23.008(b) is not persuasive. First, it is in fact not compelled by the text. The phrase “before leaving the state” can easily be read to apply only to the absences referenced in subsection (b) itself—absences that come *after* the six months. Thus, the subsection would effectively mean:

An individual may not claim an allowable absence under (a)(1) – (15) of this section unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state for that absence.

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<sup>6</sup> To be fair to the Division, this was an analysis developed off the cuff during the course of the hearing as the administrative law judge and the Division’s advocate discussed the relevant legal provisions. It may not be a position the Division would take if it had more time to reflect on the practical ramifications, which are discussed below.

This reading has the considerable virtue of permitting the Department of Revenue to honor the Legislature's definition of "state resident" at the end of AS 43.23. A requirement of continuous physical presence does not have to be superimposed on that definition.

Second, the Division's reading would lead to an unworkable result. The Division would read AS 43.23.008(b) to mean:

An individual may not claim an allowable absence under (a)(1) – (15) of this section unless the individual was physically present in the state for at least six consecutive months immediately before leaving the state.

No applicant could use an (a)(1) – (15) absence unless he or she spent the preceding six consecutive months in the state. Many Alaskans go "Outside" more often than once every six months, meaning that residents with years or decades of residency might still be unable to use any of the absences in (a)(1) – (15). As an example, take a lifelong resident who spends the month of February vacationing in Hawaii and then is called up for military service overseas beginning in June and continuing through the end of the year. Under the Division's proposed reading of AS 43.23.008(b), this person would not receive a dividend the following year, since the Hawaii vacation would have rendered the allowable absence for military service unavailable. It is not clear that the Division has the means or desire to enforce such a restriction, and it is unlikely that the Legislature would have intended it to do so.

Reading AS 43.23.008(b) to require only legal residence for the six months preceding an absence under AS 43.23.008(3), rather than continuous physical presence, one must conclude that Mr. B was allowably absent when he was in Afghanistan. His residency began when he physically arrived in Alaska on September 1, 2005. It continued while he was temporarily and allowably absent for military training beginning the following January, and it continued when he briefly returned to physical presence in the state in May of 2006. By the time of his deployment to Afghanistan, he had 286 days of continuous *residency* in the state "immediately before" leaving for that absence. He therefore could claim an absence for active duty military service while in Afghanistan. There is no 180-day time limit on that kind of allowable absence, and so the fact that it persisted for 187 days did not disqualify him from a dividend.

A second legal provision, the regulation at 15 AAC 23.163(b), also bears on this issue, although by the end of the hearing the Division and the applicant were not in disagreement about it. 15 AAC 23.163(b) provides that "An individual who was absent from Alaska for more than 180 days is not eligible for a dividend if the individual . . . was not a state resident for at least 180 days

immediately before departure from Alaska.” Because it was longer than 180 days, Mr. B’s second absence must fit within this regulation. For essentially the same reasons discussed above, it does. A definitional provision at 15 AAC 23.993(a)(12) establishes that “resident” in this regulation has the same meaning given in AS 43.23.095(7), a meaning not dependent on continuous physical presence. Moreover, the drafters of 15 AAC 23.163 knew how to require physical presence when they needed to, using the phrase “physically present” in subsection (a) of the regulation instead of the term “resident.” This indicates that the fact that “physically present” does not appear in 15 AAC 23.163(b) reflects a deliberate choice.

#### **IV. Conclusion**

J B was an Alaska resident sufficiently in advance of his deployment to Afghanistan to be eligible to claim an allowable absence of more than 180 days while serving in that country. He is entitled to a 2007 PFD.

#### **V. Order**

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of J B for a 2007 permanent fund dividend is REVERSED.

IT IS FURTHER ORDERED that the application of J B for a 2007 permanent fund dividend be GRANTED.

DATED this 30<sup>th</sup> 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 26<sup>th</sup> day of August, 2008.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Administrative Law Judge  
Title

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