

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

In the Matter of :)	
)	
S. O.)	
)	OAH No. 08-0480-PFD
<u>2007 Alaska Permanent Fund Dividend</u>)	Agency No. 2007-056-6866

DECISION

I. Introduction

S. O. appeals the denial of her application for a 2007 permanent fund dividend (PFD). The Permanent Fund Dividend Division denied the application because Ms. O. was not an Alaska resident for all of 2006, the qualifying year for the 2007 PFD. Ms. O. requested a formal hearing by correspondence indicating that she had additional evidence of residency to submit.¹

By notice dated September 15, 2008, Ms. O. was given until October 16, 2008 to send any additional documents or correspondence for consideration in this formal appeal. The division was given the same deadline. Both parties then had until October 27, 2008, to respond to any documents received from the other. The division filed a position statement and hearing exhibits. Ms. O. did not add to the record on appeal.

The division incorrectly denied Ms. O.'s application for a 2007 PFD. Ms. O. did not sever her Alaska residency, she maintained her principal home in Alaska and she was allowably absent in 2006. Accordingly, Ms. O. is eligible for a 2007 PFD and the decision of the division should be reversed.

II. Facts

Ms. O. has a lengthy history of ties to Alaska. In 1984, Ms. O. moved to Alaska, registered a vehicle and obtained an Alaska driver's license. In 1987, she and her husband started their first business, a restaurant.² In 1989 she registered to vote and in 1990 Ms. O. and her husband bought a house.³ In 1992, Ms. O. and her husband started another business.

Ms. O. received PFDs from 1985 through 1999.⁴ In 2000 and 2001 she did not receive a dividend because she was absent from the state for more than 180 days during the qualifying

¹ Exhibit 7 at 2.

² Exhibit 5 at 2.

³ Exhibit 2 at 2; *See also* Exhibit 7 at 2.

years for each of those dividends accompanying her minor children while they attended school out of state, and returning for the summer.⁵ In 2002-2004, she did not apply for the PFD.⁶ Ms. O. claims she returned to Alaska in 2004, the qualifying year for the 2005 PFD. She filed for her 2005 and 2006 PFDs, which were denied when she failed to respond to the division's request for additional information.⁷ Ms. O. has applied for and received a 2008 PFD. While Ms. O. was absent, her husband stayed in Alaska tending to the family business and maintaining the family home.

While absent, Ms. O. resided in New Jersey and obtained a New Jersey driver's license. A credit report lists both her Alaska and New Jersey addresses.⁸ In 2004, the Division of Elections sent Ms. O. a purge notice and when she did not respond, Ms. O.'s voter registration was inactivated. Ms. O. re-registered to vote in September 2006. She relinquished her New Jersey driver's license and obtained an Alaska driver's license on October 31, 2006.

III. Discussion

The division contends that Ms. O. is ineligible for the 2007 PFD because she (1) is not a state resident as defined by law and (2) engaged in a disqualifying action by (a) maintaining her principal home elsewhere and (b) her absence from the state was not allowable under AS 43.23.008.⁹

Specifically, the division believes that Ms. O. severed her residency ties to Alaska when she moved to New Jersey with her children. The division believes that Ms. O. did not reestablish those ties until she re-registered to vote and obtained an Alaska driver's license in 2006. The division reasons that it was Ms. O.'s practice to be with her minor children and that because her youngest son did not turn 18 until May 23, 2008, it is more likely than not that she was with him. Her son did not return to Alaska until June 25, 2006. Therefore, the division reasons that Ms. O. did not physically return to Alaska until June 25, 2006, at the earliest.¹⁰ Ms. O. believes she has remained an Alaska resident because she has always intended to return to Alaska. Her husband, business, and home are all in Alaska. She argues that she was temporarily absent with

⁴ As represented in the division's Formal Hearing Position Statement at 1.

⁵ Exhibit 8.

⁶ As represented in the division's Formal Hearing Position Statement at 1.

⁷ As represented in the division's Formal Hearing Position Statement at 1.

⁸ Exhibit 4 at 1.

⁹ Division Position Statement at 3.

¹⁰ Exhibit 9 at 5.

her children. Ms. O. has the burden of proving that it is more likely than not that she did maintain Alaska residency during the years from 2000 – 2006.¹¹

A. *Ms. O. Remained An Alaska Resident While Absent From The State*

1. Ms. O.'s Failure To Apply For Prior Year Dividends And The Division's Denial Of Ms. O.'s 2005 And 2006 PFD Applications Do Not Govern

The division places a great deal of emphasis on the fact that Ms. O. did not file for a PFD from 2001 to 2004, “indicating that more likely than not, [she] severed [her] ties to Alaska and/or moved from Alaska to live elsewhere.”¹² The division emphasizes that Ms. O. has “been denied the PFD since 2000 for various reasons; either absences exceeding 180 days, actions inconsistent, not responding to request for information and not disclosing absences to the division.”¹³ The division’s emphasis is misplaced.

An Alaska resident is not required to file for a PFD. It is a resident’s prerogative to determine whether he or she wishes to apply for a PFD. It is also a resident’s right to decide whether to pursue an application denial or provide additional information to the division when requested.

Ms. O.’s 2000 and 2001 PFD applications were denied because she was not allowably absent from the state during the qualifying years for those PFDs. For reasons not reflected in the record, Ms. O. did not apply from 2002 to 2004. Ms. O. asserts that she returned to Alaska in 2004, which is the qualifying year for the 2005 PFD. Ms. O. filed for the 2005 and 2006 PFDs. The division could not determine if Ms. O. was eligible for those PFDs without the additional information, which it had requested. When Ms. O. did not provide the additional information, the division denied her 2005 and 2006 PFD applications.¹⁴

None of these denials were contested in a formal appeal, and thus the decisions denying the dividends did not resolve any facts. The decision to deny a PFD application is a unilateral decision by the division and not an adjudication entitled to a preclusive effect in subsequent litigation. Therefore, Ms. O.’s failure to file for a PFD or to appeal prior application denials is not reliable evidence that she lacks the intent to return to Alaska and remain indefinitely.

¹¹ 15 AAC 05.030(h).

¹² Exhibit 6 at 1.

¹³ Exhibit 6 at 2.

¹⁴ Division Position Statement, Factual Background, at 1.

2. Ms. O. Was A State Resident Prior To Her Departure To Accompany Her Children And She Remained A State Resident During Her Absence

In addition to Ms. O.'s failure to file for a PFD or appeal the denial of prior years' PFDs, the division contends that Ms. O. took actions inconsistent with an intent to return to Alaska and remain indefinitely and that she is therefore not a state resident for purposes of the PFD as a matter of law. Specifically, during the years in question, Ms. O. spent the majority of her time in New Jersey; she obtained a New Jersey driver's license which she kept until October 31, 2006 when she received her Alaska driver's license; she did not re-register to vote in Alaska until the fall of 2006; and she used a New Jersey address to obtain credit.

The definition of state resident as it applies to the Alaska Permanent Fund Dividend program is set out in AS 43.23.095(7). A person who has established Alaska residency for purposes of the PFD program remains a resident if he or she "intends to return to the state to remain indefinitely under the requirements of AS 01.10.055."¹⁵ Under AS 01.10.055, an Alaska resident who is absent from the state remains a resident unless the person (1) "establishes or claims residency in another state" or (2) "performs other acts or is absent under circumstances that are inconsistent with the intent [to remain in the state indefinitely]."¹⁶

The term "establishes residency" is given a definite and precise meaning in AS 01.10.055(a): presence in Alaska with the intent to remain indefinitely and to make a home in the state. Under the doctrine of statutory construction *in pari materia*, a word or phrase used in one subsection of a statute is generally given the same meaning when repeated elsewhere in another subsection of the same statute. Thus, under AS 01.10.055(c), for Ms. O. to establish residency in another state, she must be physically present in that other state with the intent to remain indefinitely.

The Department has promulgated regulations to assist the division in assessing the eligibility of an applicant.¹⁷ Under 15 AAC 23.143(a) an individual's intent to:

return to Alaska and remain indefinitely is demonstrated through the establishment and maintenance of customary ties indicative of Alaska

¹⁵ AS 43.23.095(7).

¹⁶ AS 01.10.055(a), (c).

¹⁷ The Alaska Supreme Court has upheld regulations restricting eligibility for a PFD beyond the specific statutory requirements of AS 43.23.005(a) and AS 43.23.008. *See Church v. State, Dept. of Revenue*, 973 P.2d 1125 (Alaska 1999); *Brodigan v. Alaska Dept. of Revenue*, 900 P.2d 728 (Alaska 1995); *State, Dept. of Revenue, PFD Division v. Bradley*, 896 P.2d 237 (Alaska 1995); *State, Dept. of Revenue, PFD Division v. Cosio*, 858 P.2d 621 (Alaska 1993).

residency and the absence of those ties elsewhere. Acts that are required by law or contract or are routinely performed by temporary residents of Alaska are not by themselves evidence of residency. In evaluating whether an individual claiming Alaska residency has demonstrated an intent to remain indefinitely in Alaska, the department will consider whether or not an individual has:

- (1) taken steps to establish Alaska residency and sever residency in a previous state or country;
- (2) ties to another state or country that indicate continued residency in the other state or country; and
- (3) taken other action during the qualifying year, through the date of application, that is inconsistent with an intent to remain in Alaska indefinitely.¹⁸

When assessing whether an applicant has taken some action that may be considered inconsistent with the intent to return to Alaska and remain indefinitely, the applicant's acts should be considered in light of all the circumstances and not viewed in isolation.¹⁹

It is undisputed that Ms. O. was a resident of Alaska for purposes of the PFD program. The division recognizes Ms. O.'s lengthy history of ties to Alaska and that she returned each summer. The division acknowledges that while Ms. O. was in New Jersey her husband, business, and the home they purchased, remained in Alaska. Ms. O. readily admits she was absent for extended periods of time, but these absences were temporary and for the purpose of accompanying her minor children while they attended school. Once her children were no longer in school, she returned to Alaska where her husband, home, and business are located.

Ms. O. did spend extended periods of time in New Jersey, but she was not in New Jersey for an indefinite period of time. Obtaining a drivers license in another state is often a legal requirement for a temporary resident. Having her New Jersey address appear on a credit report is evidence of nothing more than what has already been established, that Ms. O. was present in New Jersey. Ms. O. may have spent the majority of her time during the period in question elsewhere, but under these circumstances it is not compelling evidence. As discussed below, the Department recognizes that a person may maintain a principal home in one state even if that

¹⁸ 15 AAC 23.143(a).

¹⁹ See AS 43.23.015(a) ("the commissioner shall consider all relevant circumstances in determining the eligibility of an individual.")

person spends the majority of her time elsewhere.²⁰ Under these conditions, Ms. O.'s decision to accompany her minor children while they attended school out of state is not inconsistent with the intent to return to Alaska and remain indefinitely.

When viewed as a whole, the preponderance of the evidence supports a finding that Ms. O.'s actions were consistent with maintaining Alaska residency. The division's argument that Ms. O. did not meet the definition of an Alaska resident for purposes of the PFD program during all of 2006, the qualifying year for the 2007 PFD, is rejected.

B. Ms. O. Did Not Engage In A Disqualifying Activity

To receive a PFD, in addition to establishing Alaska residency and maintaining the intent to return to Alaska and remain indefinitely, an individual must meet certain eligibility criteria. A resident remains eligible for a PFD by not engaging in a disqualifying activity such as maintaining a principal home in another state or being absent for other than an allowable reason during the qualifying year. The qualifying year for the 2007 PFD was 2006.²¹

1. Ms. O. Did Not Maintain A Principal Home In Another State

By regulation an otherwise eligible applicant is disqualified if the applicant has "maintained the individual's principal home in another state... regardless of whether the individual spent a majority of time at that home except, while absent for a reason listed (A) in AS 43.23.008(a)(1)-(3) or (9)-(11) or (B) in AS 43.23.008(a)(13), if the eligible resident whom the individual accompanies is absent for a reason listed in (A) of this paragraph."²² The disqualification occurs if the disqualifying action is taken at any time beginning January 1 of the qualifying year (in this case 2006) through the date the application is complete.

Ms. O. purchased her home in Alaska in 1990 and she has traveled back and forth between New Jersey and Alaska for her children's education. Because Ms. O. was absent for extended periods of time it is reasonable to conclude that she had some place of residence in New Jersey. However, because her husband, her business and her purchased home were all in Alaska, it is more likely than not that Ms. O. maintained her principal home in Alaska even though she did not spend a majority of her time in Alaska.

²⁰ 15 AAC 23.143(d) provides that an individual may maintain a principal home in another state regardless of the amount of time spent at that home.

²¹ AS 43.23.095(6).

²² 15 AAC 23.143(d)(1).

C. Ms. O. Was Allowably Absent In 2006

To remain eligible for a PFD, the applicant must have been physically present in Alaska throughout the qualifying year, or have been absent only for one of the allowable reasons listed in a statutory section entitled “Allowable Absences,” AS 43.23.008.²³ 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.²⁴

Ms. O.’s son was absent a total of 171 days in 2006.²⁵ The division has taken the position that it is reasonable to conclude that Ms. O.’s absence coincided with her son’s.²⁶ Therefore, it is more likely than not that Ms. O. was absent for a total of 171 days in 2006. Ms. O. was allowably absent during the qualifying year.

IV. Conclusion

Ms. O. remained a resident of Alaska for purposes of the PFD program while she was absent from the state with her children. She maintained her principal home in Alaska and she was absent less than 180 days in 2006. Ms. O. is therefore eligible for a 2007 PFD.

²³ AS 43.23.005(a)(6) provides “(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if the individual ... (6) was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008; ...”

²⁴ Combined absences not exceeding 180 days are allowable. 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.*

²⁵ Division Position Statement at 3.

²⁶ Division Position Statement at 2, 3.

The decision of the division to deny S.O. a 2007 PFD is REVERSED.

DATED this 12th day of February, 2009.

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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 13th day of March, 2009.

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

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