

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

IN THE MATTER OF )  
 )  
 E. & W. M. )  
 ) Case No. OAH 09-0003-PFD  
 ) Agency Nos. 2007-048-6583 & 2007-048-6896  
2007 Permanent Fund Dividend )

**DECISION**

**I. Introduction**

E. and W. M. timely applied for 2007 permanent fund dividends. The Permanent Fund Dividend Division (“the division”) determined that the applicants were not eligible, and it denied the application initially and at the informal appeal level. The applicants requested a formal hearing by written correspondence only.

Mr. M. has not overcome the presumption that he is no longer an Alaska resident. Ms. M. was unallowably absent during the qualifying year. The division’s decision is affirmed.

**II. Facts**

Mr. M. serves in the Army. He first came to Alaska sometime between December of 1998 and February of 1999 and left the state less than three years later when the Army assigned him to another duty station. Ms. M. has lived in Alaska most or all of her life; she left the state with Mr. M. and has accompanied him since. Mr. and Ms. M. left Alaska on December 7, 2001, and Mr. M. reported to Fort Lee, Virginia, on January 14, 2002.

In the five years prior to his application, Mr. M. returned to Alaska three times: once in 2004 for six days, once in 2005 for seven days, and once in 2006 for eight days, a total of twenty-one days during the period. During this five-year period, Mr. M. served in Iraq twice for a total of 22 months. Ms. M. made the same trips back to Alaska, plus she also returned once in 2003 for nine days, making her cumulative time in Alaska thirty days during the five-year period.

On their Supplemental Schedules, Mr. and Ms. M. both identified June 1, 2018, as the date they expect to return to Alaska to remain indefinitely. On an Eligibility Questionnaire, the division asked why Mr. M. had not submitted a request to be returned to Alaska by the military. Mr. M. responded, “because we are only ½ way through my military career. We hope our last 3 yrs of service will be stationed in AK so we will be already there upon deactivation of service. I go where the military assigns me to a job!”

Mr. M. repeatedly emphasizes his “paper ties” to Alaska:

I have also maintained ties to the state by maintaining my primary checking and savings account in AK through Alaska USA FCU, obtained a car loan through Mat Valley FCU, registered to vote and voted for Alaska through absentee ballots, maintain a current AK driver's license, and maintain vehicle registration on both vehicle and a utility trailer with AK.

Neither Mr. nor Ms. M. appears to have established significant residency ties to any other state.

### **III. Discussion**

A person who has been allowably absent for more than five years is, by law, presumably not an Alaska resident anymore.<sup>1</sup> If an applicant attempts to overcome this presumption, the Division may rely on the following factors when making a decision<sup>2</sup>:

- (1) the length of the individual's absence compared to the time the individual spent in Alaska before departing on the absence;
- (2) the frequency and duration of return trips to Alaska during the absence; the fact that the individual has returned to Alaska in order to meet the physical presence requirement of AS 43.23.005 (a)(4) is not sufficient in itself to rebut the presumption of ineligibility;
- (3) whether the individual's intent to return or remain is conditioned upon future events beyond the individual's control, such as economics or finding a job in Alaska;
- (4) any ties the individual has established outside Alaska, such as maintenance of homes, payment of resident taxes, vehicle registrations, voter registration, driver's licenses, or receipt of benefits under a claim of residency in another state;
- (5) the priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel;
- (6) whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska; and
- (7) any ties the individual has maintained in Alaska, such as ownership of real and personal property, voter registration, professional and business licenses, and any other factors demonstrating the individual's intent.

When considering these factors, the Division must “give greater weight to the claim of an individual who makes frequent voluntary return trips to Alaska during the period of the individual’s absence than to the claim of an individual who does not.”<sup>3</sup> In considering what constitutes “frequent” return trips, thirty days in five years serves as a kind of guideline. Unless unavoidable circumstances have prevented return trips, the Division must “generally consider that an individual who has not been

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<sup>1</sup> 15 AAC 23.163(f).

<sup>2</sup> 15 AAC 23.163(g).

<sup>3</sup> 15 AAC 23.163(h)(1).

physically present in Alaska for at least 30 cumulative days during the past five years has not rebutted the presumption” that he is no longer an Alaska resident.<sup>4</sup> The final rule governing this case is that a person requesting a formal hearing has the burden of proving that the Division’s decision was in error.<sup>5</sup>

Although Mr. M. characterizes his returns to Alaska as “frequent,” twenty-one days in five years does not meet the regulatory measure of what constitutes a significant amount of time in Alaska. Mr. M. spent nearly two full years of the five-year period serving in Iraq, and it is a fair point to consider returns to Alaska for vacationing and visiting family as not a very realistic option during these deployments. But during the remaining time, there is not evidence that unavoidable circumstances prevented lengthier stays in Alaska. Thus, evidence indicating Alaska residence should be given less weight than in a case involving an applicant who had made more frequent returns to the state.

Addressing the seven factors identified in 15 AAC 23.163(g), Mr. M.’ short period of residence in Alaska, less than three years, compares unfavorably to the seven years he has been absent, and the total of about sixteen and a half years that he anticipates being absent before returning to Alaska in 2018. Mr. M. may have intended to return to Alaska someday when he left, but it is difficult to predict where life will take a person a decade or two in the future. Three years spent in Alaska in a person’s early to mid 20s’ is not a strong indication that the person will return to Alaska around the age of forty.

The frequency and duration of Mr. M.’ return trips to Alaska is discussed above. In his appeal, Mr. M. states, “I have returned to the state every year I was available and within the PFD stated requirement to return for at least 72 hours every 2 years.”<sup>6</sup> As the regulation states, “the fact that the individual has returned to Alaska in order to meet the [72-hour] physical presence requirement of AS 43.23.005 (a)(4) is not sufficient in itself to rebut the presumption of ineligibility.” Mr. M. did return once more than the minimum of a return every other year, and he stayed more than 72 hours each time. Nevertheless, visits of six to eight days each are not returns of a substantial duration.

Mr. M. has not established significant ties to any other state. His actions in this regard are consistent with service members, who must move frequently. Mr. M. has stayed in government

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<sup>4</sup> 15 AAC 23.163(h)(2).

<sup>5</sup> 15 AAC 05.030(h).

<sup>6</sup> Exhibit 6, page 9.

quarters, except for a period when he was stationed at Fort Campbell in Kentucky, where on-base housing was not available.

Mr. M. asserts that the Army no longer uses the traditional assignment preference list, or “dream sheet.” Mr. M. states that the Army provided him with a list of available assignments for him to choose from, and none of the offered assignments were in Alaska. This factor does not appear to weigh in either direction. The division may wish to reevaluate this part of the regulation in light of current military practice.

On his Adult Eligibility Questionnaire, Mr. M. answered “yes” to the question, “is your choice of career one which does not allow you to reside or return to Alaska until retirement or until you make a personal choice to change careers in order to return to Alaska?” In his appeal, Mr. M. states,

I did choose to be a member of the Armed Forces, but this does not prohibit me from living in Alaska as there are military installations within the state. Based on the needs of the Army they assign me to serve at different location and this does require me to move outside of the state. When an available slot is open for my pay grade and MOS, AK will be first on my priority list.<sup>7</sup>

In *State, Department of Revenue, Permanent Fund Dividend Division v. Wilder*,<sup>8</sup> The Supreme Court stated that the division could properly consider whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska. The *Wilder* court went on to state that

Without minimizing the unique nature and special demands of a career in the military, we conclude that Wilder has made a choice, and that choice is inconsistent with an intent “at all times” to return to Alaska. In determining an individual's intent to return to Alaska, the Department is specifically authorized to consider both “the priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel” and “whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska.” Though Wilder may express a wish to return to Alaska, any present desire to do so appears to have been outweighed by a career choice which does not allow for such a return until after retirement. Under these circumstances, the Department could reasonably conclude that Wilder has not evidenced an intent to return to Alaska sufficient to maintain eligibility for PFDs.<sup>9</sup>

The court reaffirmed this view in a case remarkably similar to this one, *Anderson v. State*.<sup>10</sup> The court affirmed the division’s decision to deny a dividend to a military member for reasons very

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<sup>7</sup> Exhibit 6, page 6.

<sup>8</sup> *State, Department of Revenue, Permanent Fund Dividend Division v. Wilder* 929 P.2d 1280 (Alaska 1997).

<sup>9</sup> *Id.* at 1283.

<sup>10</sup> *Anderson v. State, Department of Revenue, Permanent Fund Dividend Division* 26 P.3d 1106 (Alaska 2001).

similar to the reasons the division cited for denying Mr. M.' application:

The department principally relied on three factors when it denied Anderson's application: (1) the short period of Anderson's adult residency in Alaska as compared to his length of absence; (2) Anderson's career choice and his resulting lack of control with respect to residency; and (3) the infrequent and short duration of the return visits Anderson made to Alaska during his absence. Given this evidence, and the regulation requiring the department to give greater weight to the claims of individuals who make frequent, non-compulsory return visits to Alaska, the department found that Anderson had not overcome the presumption of non-residency.<sup>11</sup>

Anderson had visited Alaska three times in the five-year period before his application, for a total of only seven days. Like Mr. M., Anderson had established residency in Alaska during a military assignment of approximately three years. Unlike Mr. M., Anderson had also grown up in Alaska and spent most of his childhood in Kenai and Soldotna before returning for his three-year military assignment. Mr. M. argues that the Army does have installations in Alaska and that, theoretically at least, he might be given another assignment in Alaska. But he concedes that so far he has been offered no further opportunities to return to Alaska. Considering the similarity of Anderson's and Mr. M.' situations, the division appears to have made a decision in this case consistent with past decisions.

Mr. M. makes repeated references to his voter registration, vehicle registration, driver's license, and two accounts with credit unions based in Alaska. These ties are entitled to some weight, but do not by themselves establish that Mr. M. intends to return to Alaska. As the *Wilder* court stated,

The Department discounted what it called Wilder's "paper ties" to Alaska. These ties, including Alaska motor vehicle registration, Alaska voter registration, Alaska driver's license, and membership in the Alaska Bar Association, are entitled to some weight. However, they are not conclusive evidence on the issue of intent to return to Alaska. Sound policy requires more than such "paper ties" to establish eligibility for PFDs.<sup>12</sup>

While Mr. M. emphasizes these ties, the division did not err by giving them less weight than the frequency and duration of Mr. M.' returns to Alaska, the short amount of time Mr. M. was in the state relative to the length of time he has been out of the state, and Mr. M. decision to seek a career of service that does not allow him to spend much of his career in Alaska.

Ms. M. was absent for almost all of the qualifying year. She claims an allowable absence under AS 43.23.008(a)(3) as a spouse accompanying an active duty member of the armed forces who is eligible for a current year dividend. Because Mr. M. is not eligible for a 2007 dividend, Ms.

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<sup>11</sup> *Anderson v. State, Department of Revenue, Permanent Fund Dividend Division* 26 P.3d 1106, 1110 (Alaska 2001).

M.' absence was not allowable under AS 43.23.008, and she is therefore not eligible under AS 43.23.005(a)(6). It is unnecessary to determine whether Ms. M. is an Alaska resident.

**IV. Conclusion**

The division has considered the relevant evidence, and it did not err by concluding that Mr. M. has not overcome the legal presumption that he is no longer an Alaska resident. Ms. M. was unallowably absent during the qualifying year. The decision of the Permanent Fund Dividend Division to deny the applications of E. and W. M. for 2007 permanent fund dividends is AFFIRMED.

DATED this 23rd day of February, 2009.

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 26th day of March, 2009.

By: Signed  
Signature  
Dale Whitney  
Name  
Administrative Law Judge  
Title

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