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

IN THE MATTER OF	)	
	)	
C. & K. T. and their	)	
child C. T. II	)	
	)	Case No. OAH 09-0008-PFD
2008 Permanent Fund Dividend	)	

DECISION

I. Introduction

C. and K. T. timely applied for 2008 permanent fund dividends for themselves and for their child C. T., II. The Permanent Fund Dividend Division ("the division") determined that the applicants were not eligible, and it denied the applications initially and at the informal appeal level. The T.s requested a formal hearing by written correspondence.

After the close of the record, the administrative law judge reopened the record to provide the T.s an opportunity to provide evidence that they updated their property tax records in Georgia to show that that they were not Georgia residents at any time during 2007, the qualifying year, and that they have paid the full amount of property tax for nonresident property owners in that state from the beginning of 2007 on. The division objected to re-opening the record. The T.s submitted evidence showing that, after the record was reopened, they removed the homestead exemption from their Georgia property for the 2007 property tax year and paid an additional $381.10 in property tax to No Name County, Georgia.

The T.s' evidence will be admitted into the record. The T.s have now corrected property tax records that showed a claim of residency in Georgia that the T.s did not intend to make. The T.s have paid the correct property tax in Georgia for nonresidents for the qualifying year. Because the T.s are Alaska residents who otherwise qualify for 2008 dividends, their applications are granted.

II. Facts

Mr. T. lived in Alaska from 1995 until 2002, when the Air Force transferred him to Georgia. In October of 2002 the T.s were married in Georgia, after discussing the fact that it was Mr. T.'s dream one day to return to Alaska. Mr. T. retired from the Air Force in 2005 as a disabled veteran, and he and Ms. T. then bought a house in No Name City, Georgia, which is in No Name County. In January of 2006 Mr. T. claimed a homestead exemption on the new property, which saves the owners about $360.20 per year in property taxes.

In July of 2006 Mr. T. received an offer for a position as a P. P. A.t at Fort Greely, affording Mr. T. an opportunity to realize his dream of coming back to Alaska. The T.s moved immediately and bought a house in D. J., where they continue to reside. There appears to be no dispute that the T.s have been Alaska residents since July, 2006, and that they continue to be Alaska residents.

When they moved to Alaska, the T.s immediately listed their Georgia house for sale with a real estate agent, hoping for a quick sale. The house did not sell, and eventually the T.s took the home off the market while Mr. T.'s father did some renovating to make it more marketable. As of August, 2008, the T.s had plans to list the house with a different agent. The house has apparently stood vacant since the T.s moved to Alaska.

It appears that after they decided to build a new life in Alaska, the T.s did not give much thought to the small homestead tax exemption still on the books at the No Name County Assessor's office in Georgia as they expected, or at least hoped, to be rid of the house soon. The T.s are not experienced real estate traders. Ms. T. states that Mr. T.

> simply had no knowledge of having to cancel a homestead exemption. He is not well-versed on home ownership and all of the other paper tasks that go along with it, as he spent 22 years in the United States Air Force so the house in Georgia was only his second home purchase. This first was while on active duty in Warner Robins, Georgia and apparently when we sold it upon retiring from the military, the homestead was automatically removed.[1]

When they moved to Alaska, the T.s' intent was to sell their Georgia house as soon as possible with the help of a real estate agent. The T.s were not positioning the house for tax advantages. When the T.s learned that the exemption was the basis to deny their PFD applications, the T.s contacted the assessor in January of 2008 and had the exemption removed for that year, but they did not also remove it for 2007 at that time.

The T.s requested a hearing by written correspondence only, but they actively participated in the appeal process, providing a detailed response to the division's brief and extensive documentary evidence supporting their Alaska residency. In an order reopening the record during the correspondence hearing process, this administrative law judge explained that the reason the T.s remained ineligible was not the question of their Alaska residency, but rather that their homestead exemption in the other state was still in effect for the qualifying year, even though they had removed it for the dividend year. The T.s then notified the No Name County tax commissioner that they also had not been residents in that state at any time in 2007. The commissioner deleted the

[1] Applicants' submission of February 19, 2009.

exemption for 2007 and charged the T.s an additional $381.10 in property tax, which the T.s paid. On March 13, 2009, the division filed a "Motion Objecting to Reopening of Record for Additional Evidence."

III. Discussion

a. The T.s did not claim or maintain a claim of a homestead property exemption in another state or country during the qualifying year.

According to 15 AAC 23.143(d), "an individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual has…(6) claimed or maintained a claim of a homestead property tax exemption in another state…." The qualifying year for a 2008 permanent fund dividend was 2007. There is no dispute that the T.s did not claim a homestead exemption in another state in 2007. The issue in this case is whether, during 2007, they "maintained" an exemption that they had claimed in 2006, when the claim had been automatically renewed by the taxing agency, but was then later removed by the T.s effective the beginning of 2007, and the T.s have paid the difference in tax due.

When the qualifying year began, the T.s' Georgia house had been vacant and on the market for half of a year. It is clear that the T.s had hoped they would no longer own the house by the beginning of the qualifying year, and likely that they reasonably expected the house would have sold, in spite of whatever real estate market conditions might have existed in Georgia in 2006 and 2007. Thus, the T.s' intent was to not maintain the claim, and their expectation was that they would not own the house in 2007. When the New Year came around and the house had not yet sold, leaving the exemption in the county records was an oversight, which the T.s later corrected.

While the division objects to reopening the record to allow the T.s to submit proof they changed their tax status and paid the tax due for a nonresident, the division appears to be arguing that, once an earlier claim has been carried over to a subsequent year by the taxing authority without objection, the claim has been "maintained" and the act of maintaining the claim cannot be undone.

In *In the Matter of N.K.*, caseload no. 020556 (Dept. of Revenue 2003), the applicant owned a one-sixth share of property in Texas on which a homestead exemption had been in place during the qualifying year, for which the applicant had received a tax discount. When the matter became an issue for later PFD eligibility, the applicant contacted the county appraisal district in Texas, had the exemptions removed, and paid the additional amount of tax due for the earlier years, including the qualifying year, before his correspondence hearing. There was evidence that the applicant did not originally realize that the exemption he was claiming was for residents, but no dispute that the

homestead exemption had been on the books and that the applicant had initially received a discount until he later changed the status and paid the extra tax. The division asserts that in this case it was "determined that the individual himself did not have to claim residency in another state in order to obtain an exemption." No such determination was made in the case. The hearing officer speculated *in dicta* that if one of the co-owners was living on the Texas property, a homestead exemption might have been appropriate under local law even if another co-owner was an Alaska resident. It was suggested that the applicant look into the matter, but the point was not the basis of the decision that the applicant was eligible.

In *In the Matter of B.P.*, caseload 030488 (Dept. of Revenue 2003), a homestead exemption had been in place for the applicant's out-of-state property during most of the qualifying year. Near the end of the qualifying year, the applicant had the exemption removed. The amount of tax that had accrued on the property was in turn adjusted upward, and the applicant paid the full non-resident amount when the tax payment came due at the end of the year. Although the exemption had been on the books of the out-of-state taxing authority during the qualifying year, the case held that the applicant had not maintained a homestead exemption in that state during the qualifying year. The decision stated that "the intent of 15 AAC 23.143(d)(6) is not obscure. The regulation disqualifies an applicant who claims to be a resident of another state. It prohibits applicants from fraudulently receiving benefits in two different states by simultaneously claiming to be a resident of both states." The applicant was found to be eligible because he ultimately did not receive a financial benefit from the homestead exemption that had been in place during the qualifying year.

In *In the Matter of C.S. and C.W.*, caseload no. 040353 (Dept. of Revenue, 2004), the applicant had a homestead exemption in effect for out-of-state property during the qualifying year and at the time she applied for a dividend. At the time she applied the applicant did not know what the tax status was of her out-of-state property, and she did not know what the rules were for homestead exemptions. After her application was denied, the applicant retroactively removed the exemption for the qualifying year onward and paid the additional tax due. The decision held that "in a case like this, where the applicant had no improper intent, has taken it on herself to correct the records of the other jurisdiction, and has disavowed any benefit from the other state, it would simply be unfair to find that she has maintained a homestead exemption in another state."

In *In the Matter of R.&A.T.*, caseload number 000352, (Dept. of Revenue 2001), a lawsuit erupted over the sale of an out-of-state house. The resulting court order stated that the applicants were obligated to pay tax on the property for 1998, and the purchasers were obligated to pay tax for

1999. Title to the property did not formally transfer until sometime after 2000. The applicants notified the out-of-state taxing authority in 2000 that they should not have had a homestead exemption in place from the beginning of 1998 on. The tax assessor changed the exemption for 2000, but stated that it was too late to change the status of the property for 1998 and 1999, and the exemption could not be removed even if it was improper. On behalf of the commissioner, the hearing officer found that the applicants were not eligible for 1999 dividends, because they had received a financial benefit in the 1998, the qualifying year. On reconsideration, the deputy commissioner affirmed the decision on behalf of the commissioner, stating that "the intent of [15 AAC 23.143(d)(6)] is to deny applicants the financial benefit of an Alaska Permanent Fund dividend if, during the same year as the dividend eligibility year, they enjoyed a financial benefit from a residency-based tax benefit in another state."

The following year in *In the Matter of R.&A.T.*, caseload no. 010691 (Dept. of Revenue 2002), the hearing examiner found that the applicants in the above case were eligible for 2000 dividends even though there had been a homestead exemption in their name in place on the property in 1999, the qualifying year. The distinction between the two cases was that in 1999 the applicants derived no financial benefit from the exemption because the court had ordered the buyer to pay the taxes for that year, regardless of whose name the property was in. The case held that

> When property is sold, believed to be sold, or even offered for sale, it probably stretches common sense too far to say a person *maintained* a homestead exemption because he didn't write a letter to the county assessor notifying him that he had moved to Alaska. When a sale is pending or even hoped for, there is no reason an average person would do such a thing. (Emphasis in original)

These cases make clear that there is no particular relevance to the time at which the applicant last updated or corrected the records of the taxing authority. The relevant inquiry is, as of the close of the record, whether the person maintained the homestead exemption through the qualifying year and received a financial benefit from doing so, or whether the applicant ultimately did not maintain the exemption during the qualifying year and did not receive a financial benefit inconsistent with Alaska residency. The division has cited a number of cases in which applications were denied because of the maintenance of homestead exemptions. In all of those cases, the exemption was still in place for the qualifying year at the close of the record, and the applicants had received a financial benefit from the other state.[2] As of the date of this decision, the T.s ultimately

[2] The division cites *In the Matter of R. & A. T.*, caseload number 000352, (Dept. of Revenue 2001); *In the Matter of D .A.*, caseload no. 020154 (Dept. of Revenue 2002); *In the Matter of A. S. & G. S.*, case no. 05-0300-PFD (OAH 2005); *In the Matter of J.V.*, case no. 06-0068-PFD (OAH 2005); and *In the Matter of M. & V. E.*, case no. 07-0650-PFD

did not maintain a homestead exemption on their Georgia property for 2007, and because they have paid the full amount of tax due for nonresident homeowners in Georgia, they received no financial benefit that would be inconsistent with Alaska residency.

In all of the above decisions except the first *In the Matter of R. & A .T.* case, the commissioner (acting through a delegate under AS 44.17.010) had reversed decisions of the division to deny PFD applications. The division appears now to question whether the commissioner's final decisions bind the division as it interprets and applies the commissioner's regulations:

> In Judge Whitney's Order he states "a long line of formal hearing decisions has held that while a person who has maintained a homestead exemption in another state is ineligible, if a person who has erroneously left an exemption on the taxing authority's books later takes steps to correct the error and pay the tax, that person will not have "maintained" a homestead exemption for times when the exemption was removed."
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> The fact that the Division may not have filed a Motion for Reconsideration or Proposal for Action in those cases, should not be taken as an indication that the Division was in agreement with the decisions. Due to administrative edicts past and present, it is rare that Division staff is authorized to file for Reconsideration or Action.[3]

The Alaska Supreme Court has "held that AS 43.23.015(a), the statute concerning proof of eligibility for PFDs, authorizes 'and require[s] the Commissioner of the Department of Revenue to promulgate regulations defining substantive eligibility requirements for PFDs.'"[4] It is the Commissioner's statutory duty to supervise and direct the activities of the department.[5] A final decision in a past formal hearing, when it signed by the commissioner or adopted on the commissioner's behalf by a deputy, special assistant, hearing examiner, or administrative law judge acting with a delegation of the commissioner's authority under AS 44.17.010, must be regarded as such: a final decision. Rules and interpretations in final decisions represent the opinion of the commissioner and should be given effect in subsequent cases, until the commissioner announces a

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(OAH 2006). The division opines that "no doubt there are numerous other decisions upholding denials for the same issue however, unfortunately the Division does not have a sophisticated enough query level at this time to cite all cases." The ALJ has been unable to find any case in which a homestead exemption was the basis for denying a dividend application when the applicant ultimately received no financial benefit from the exemption.

[3] Division's "Motion Objecting to Reopening of Record for Additional Evidence", March 13, 2009.

[4] *Church v. State, Dept. of Revenue*, 973 P.2d 1125, 1128 (Alaska 1999), citing *State, Dep't of Revenue v. Bradley*, 896 P.2d 237, 239 (Alaska 1995).

[5] AS 43.05.010(1).

new rule.[6] This is true regardless of whether the division did or did not propose a different action or ask the commissioner to reconsider a position.

b. The Record was Properly Reopened for Additional Evidence

In its "Motion Objecting to Reopening of Record for Additional Evidence," the division "strongly objects to reopening of the case." While most of the division's argument goes to the legal effect of the evidence submitted during the time the record was reopened, the division writes,

> There are numerous formal hearing decisions in which ALJ Whitney and other Hearing Examiners and ALJs found individuals ineligible under 15 AAC 23.153(d)(6) and none of them allowed for and correctly so, to have their case reopened to subsequently remove an exemption.

It first should be noted that this "case" was not reopened; as a final decision had not been issued, the case had yet to close. What was reopened was the time period during which evidence could be submitted to the record. Reopening the record is quite different from reopening a case after a final decision has been issued and the matter has been closed. Leaving the record open for an extended period after an in-person or telephonic hearing is common when applicants learn during the formal hearing what additional evidence they must provide to establish their eligibility. The division cites no reason to hold applicants who elect to conduct their appeals in writing to a higher standard than those who prefer telephonic or in-person hearings.

According to 15 AAC 05.030(i), "the hearing officer may allow the parties a designated time after conclusion of the hearing for the submission of additional evidence, briefs, or proposed findings, with opportunities for objection by the opposing party." According to 2 AAC 64.310, "Before the administrative law judge issues a proposed or final decision, the administrative law judge may allow a party to supplement the record for good cause shown, if another party does not object or, upon objection, is afforded a reasonable opportunity to refute the supplemental evidence." In this case the T.s were allowed a designated time for submission of additional evidence; the division objects to the admission of the evidence, and the procedural objection has been considered. The division does not appear to dispute the veracity of the evidence, which shows that, as of March 17, 2009, the records of Troup County, Georgia, show that the T.s were not claiming a homestead exemption for tax year 2007 and that they have paid the full property tax owed. Procedurally, the case has been correctly heard.

[6] See, *In the Matter of H.*, case number 08-0060-PFD (O.A.H. 2008), citing *Alaska Public Interest Group v. State*, 167 P.3d 27, 42 (Alaska 2007) and *May v. State, CFEC*, 168 P.3d 873, 884 (Alaska 2007).

The division correctly asserts that in previous correspondence hearings, decisions have been made affirming denials of dividends to people who have maintained homestead exemptions in other states, and the revenue hearing examiners or administrative law judges in those cases have not reopened the record to allow the applicants to change their status with the taxing authority. The division

> respectfully asks that ALJ Whitney not reopen the record for additional evidence regarding C. and K. T. and their child C. T. II. Reopening the record could establish and allowing retroactivity could establish precedence and be in conflict with the established regulation.

Reopening the record does not establish a precedent. In hearings under 15 AAC 05.030, the procedural conduct of the hearing and admission of evidence is a matter of discretion for the administrative law judge. If an applicant submits a cursory appeal and does not respond to argument presented by the division, in his or her discretion the ALJ may assume that the parties have submitted everything that they wish to and proceed to issue a decision based on the evidence then in the record. If both parties are actively participating in the hearing and the ALJ determines that additional evidence would serve the interests of justice, the ALJ may, in his or her discretion, explain to the parties what evidence is missing and provide them an opportunity to submit it if they can. The ALJ also has the discretion to reopen the record if new evidence emerges indicating that the applicant is not eligible, something the division presumably would not object to.

In this case, K. T. has been an active participant in the hearing process, submitting thorough responses to the division's briefs and extensive documentary evidence of her family's Alaska residency. While the division has correctly notified the applicants of the issue regarding the homestead exemption, it is clear that Ms. T. did not fully understand the difference between the technical disqualifying actions of 15 AAC 23.143(d) and the residency requirements of AS 43.23.005(a), or the need to document compliance with both during the dividend year and during the qualifying year. The T.s are not represented by counsel, they lack the division's extensive experience and expertise in PFD law, and unlike the division they were not parties to the cases cited above. It is almost certain that if the T.s had been made aware of the cases cited above, as the division presumptively was, they would have updated their records in Troup County and paid the additional tax long before reaching the formal hearing stage of an appeal. Under these circumstances, it is within the ALJ's discretion to explain the law and provide the applicants an opportunity to submit evidence that might help their case. This is true even if the evidence relates to actions taken after the reopening of the record that may affect the applicant's eligibility.

IV. Conclusion

The applicants did not maintain their earlier claim of a homestead exemption in another state during the qualifying year or any time thereafter. The applicants have not gained any benefit by claiming residency in another state or country during the qualifying year or at any subsequent time. The applicants have been Alaska residents at all relevant times and have met all requirements to qualify for 2008 dividends. The applications of C. T., K. T., and C. T., II, for 2008 permanent fund dividends shall be GRANTED.

DATED this 23rd day of April, 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 22nd day of May, 2009.

By: *Signed*
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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