

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

In the Matter of :)	
)	
S. M. and)	
B. M. and N. N., minors.)	OAH No. 09-0097-PFD
<u>2008 Alaska Permanent Fund dividend</u>)	DOR No. 2008-006-7933

DECISION

I. Introduction

S. M. filed timely applications for 2008 Alaska Permanent Fund dividends for herself and as the sponsor of her two minor children, B. M. and N. N. The Permanent Fund Dividend Division denied the applications. Ms. M. filed a timely appeal and requested a hearing by correspondence. The case was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted a telephonic hearing. Ms. M. participated, and Peter Scott represented the division.

Because Ms. M. claimed a tax deduction for moving expenses in the qualifying year, her application was correctly denied. Because Ms. M. did not show that she and her children remained residents through the date of application, they are ineligible. The division’s decision is therefore sustained.

II. Facts

S. M. and her husband moved to Alaska in 2004, after he obtained a job working at Fort Wainwright as an employee of Inuit Services. He later went to work for the Department of Defense. In November, 2007, Mr. M. accepted a job in Indiana with E., a Department of Defense contractor, on a one-year contract. E. has a Fairbanks office, but no positions were available that office. He and his family planned on returning to Alaska when a position opened up in E.’s Fairbanks office.

In December, 2007, the M. executed an agreement to rent their Fairbanks house, with an option to purchase. The house was sold in September, 2008. By November, 2008, no positions had come open in E.’s Fairbanks office, so Mr. M. renewed his Indiana contract for another year. Mr. M. has continued working for E., and the couple has not returned to Alaska since they left.

The M. took a deduction on their 2007 tax return for moving expenses. After their applications for the 2008 dividend were denied, they considered filing an amended return to eliminate the claimed deduction, but eventually decided not to do so.

III. Discussion

A. Standard of Proof

The burden of proof and of coming forward with evidence is on Ms. M..¹ Facts must be established by a preponderance of the evidence.² To warrant reversal of the division's decision, the preponderance of the evidence must establish facts demonstrating that the division's decision was erroneous.³

B. Eligibility

The division's informal conference decision denied S. M.' application on four grounds: (1) she moved from Alaska and took an action that made her ineligible for a dividend; (2) she did not maintain the intent to remain in Alaska indefinitely and she was not a resident, for purposes of the dividend program, throughout the qualifying year and through the date her application was complete; and (3) her absence during the qualifying year was not allowable.⁴ Her children's applications were denied (4) for lack of an eligible sponsor.⁵

1. Moving and Taking Actions Inconsistent With Alaska Residency

As legal authority for denial of the application, the informal conference decision references 15 AAC 23.143(a) and (d).

15 AAC 23.143(a) provides that in determining residency, the division considers "whether or not an individual has...taken...action...that is inconsistent with an intent to remain in Alaska indefinitely."⁶

By its terms, 15 AAC 23.143(a) simply states that certain facts will be considered in determining whether or not an individual is an Alaska resident. 15 AAC 23.143(a) does not state a separate ground for denial of an application. The issue to be determined, with respect to 15 AAC 23.143(a), is whether an individual is an Alaska resident, not whether the individual engaged in a specific conduct that renders the individual ineligible for a dividend.

¹ 2 AAC 64.290(e).

² *Id.*

³ 15 AAC 05.030(h).

⁴ Ex. 10, p. 1.

⁵ Ex. 10, pp. 11, 14.

15 AAC 23.143(d) provides a laundry list of actions that, without regard to residency, will render an individual ineligible for a dividend. In the informal conference decision, and on appeal,⁷ the division asserts that Ms. M. is ineligible because she took a deduction for moving expenses on her 2007 federal income tax return: 15 AAC 23.143(d)(10) provides that a person is ineligible for a dividend if, during the qualifying year through the date of application, the individual moves from Alaska for other than certain specified reasons and the individual claims moving expenses as a federal income tax deduction. It is undisputed that Ms. M. left Alaska in 2007 to accompany her husband, and that he left Alaska in order to take a civilian job outside the state. The reason she left the state is not one of the reasons specified in 15 AAC 23.143(d)(10)(A). Accordingly, if she claimed a tax deduction for those moving expenses before the date of application, under 15 AAC 23.143(d)(1)(B) she forfeited her eligibility for the 2008 dividend. The date of application is defined as the date an application is complete, including supplemental information requested by the division.⁸ In this case, the application was complete no sooner than when the division received the M.' 2007 tax return. Since the tax return shows a deduction for moving expenses, and the return has not been amended, Ms. M. is ineligible for the 2008 dividend.⁹

2. *Residency*

The informal conference decision lists as two separate grounds for denial of Ms. M.' dividend that she (1) failed to maintain the intent to return to Alaska and remain indefinitely and (2) was not an Alaska resident through the date her application was complete. These are, however, indistinguishable grounds, since maintenance of the intent to return to Alaska and remain indefinitely is essential to a claim of residency for a person who is living out side of Alaska.¹⁰ The necessary intent "is demonstrated through the establishment and maintenance of customary ties indicative of Alaska residency and the absence of those ties elsewhere."¹¹

⁶ 15 AAC 23.143(a)(3).

⁷ Position Statement at 2.

⁸ 15 AAC 23.993(b).

⁹ On appeal the division raises a new argument it had not previously made, asserting that Ms. M. is ineligible pursuant to 15 AAC 23.143(d)(1), because she maintained her primary residence outside of the state. Position Statement at 3-4. Ordinarily, grounds for denial not raised in the informal conference decision (or earlier) are waived on appeal. Because Ms. M. is ineligible on other grounds, it is not necessary to determine whether the argument based on 15 AAC 23.143(d)(1) has been waived.

¹⁰ See AS 43.23.095(7) ("state resident" means an individual who..., of the individual is not physically present in the state, intends to return to the state and remain indefinitely....").

¹¹ 15 AAC 23.143(a).

In this case, Ms. M.’ letter of appeal points to continued ownership of a home in Fairbanks and retention of her Alaska driver’s license and voting registration as “customary ties” indicative of continuing Alaska residency.¹² The home, however, had been rented with an option to purchase, and was in fact sold in 2008. The other cited ties are formal in nature and in light of the record as a whole are not persuasive evidence of an intent to return. Furthermore, to the extent that the family retained the intent to return to Alaska, that intent was conditional on obtaining a position at E., with no understanding as to when, or even whether, such a position would become available or that Mr. M. was assured of being hired for it. Finally, there is no evidence that Ms. M. lacks equivalent ties elsewhere. On balance, the preponderance of the evidence is that Ms. M. and her children did not retain the intent to return to Alaska and remain indefinitely through the date their applications were complete. Ms. M. has failed to meet her burden of proof with respect to the division’s second and third asserted grounds for denial.

3. *Allowable Absence*

The informal conference decision states that the decision to deny the application was made because, in addition to other grounds, Ms. M.’ “absence is not allowable.”¹³

AS 43.23.008(a) provides that an otherwise eligible individual absent from the state during the qualifying year remains eligible if the individual was absent for the reasons and length of time allowed by AS 43.23.008(a)(1)-(17). The informal conference decision references AS 43.23.008(a), but does not state which of the provisions applies. The reason for that is quite simple: none of them applies. Ms. M. was absent from Alaska for less than 180 days during the qualifying year, and an absence of less than 180 days for any reason consistent with the intent to remain a state resident is allowed under AS 43.23.008(a)(17)(A). Ms. M. left the state, according to the undisputed facts, to accompany her husband while he was temporarily working out of state on a one year contract. Accompanying one’s spouse on a temporary work assignment in another state is not inconsistent with the intent to return to Alaska and remain indefinitely. Ms. M. has demonstrated, by a preponderance of the evidence, that the division’s decision was in error insofar as it was based on AS 43.23.008(a).

4. *Eligible Sponsors*

¹² Ex. 2, p. 2.

¹³ Ex. 10, p. 1.

An otherwise eligible minor applies through a sponsor.¹⁴ Because the minor children in this case were not residents through the date their applications were complete, they are not “otherwise eligible.”

IV. Conclusion

S. M. has failed to show that the division erred in determining that she was ineligible for the 2007 dividend on two grounds: (1) that she claimed a deduction for moving expenses on her 2007 tax return; and (2) that she did not retain the intent to return to Alaska and remain indefinitely through the date her application was complete. Because she is ineligible and her children were in her custody, her children are ineligible. The division’s denial of the applications of S. M., B. M., and N. N. is therefore AFFIRMED.

DATED: June 30, 2009

Signed

Andrew M. Hemenway
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 30th day of July, 2009.

By: Signed

Signature
Andrew M. Hemenway

Name
Administrative Law Judge

Title

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

¹⁴ See 15 AAC 23.113(b).