

In early August, 2003, Lt. J., his wife D., and their two children moved to Alaska, intending to remain indefinitely.⁴ Upon arrival, Lt. J. registered to vote in Alaska and obtained an Alaska driver's license.⁵ On August 19, after he had moved to Alaska and become a resident of the state, Lt. J. was "appointed [by the Adjutant General of the State of Alaska Department of Military and Veterans' Affairs] in the [A.] A. N. G." under the Active Guard Reserve (AGR) program, retroactively to July 9, 2003.⁶ The appointment lists his HOM (home of record) as Michigan.⁷ Although he was no longer a resident of Michigan, Lt. J.'s leave and earnings statements continued to include the letters "MI" in a box adjacent to the "State Taxes" box on the statement.⁸ Lt. J. applied for and was paid dividends for 2005 and 2006.

On March 31, 2006, Lt. J. was placed on active duty, in preparation for deployment to Afghanistan.⁹ Before he left, Lt. J. submitted to his Human Resources Office a second DD 2058 form claiming Alaska as his legal state of residence for income tax withholding purposes.¹⁰ Due to administrative oversight or error, Lt. J.'s leave and earnings statements continued to include the letters "MI" in a box adjacent to the "State Taxes" box on the statement. Based on his leave and earnings statements, the division denied Lt. J.'s 2007 application and assessed his dividends for 2005 and 2006.

Lt. J. returned from deployment on May 31, 2007.¹¹ On June 25, 2007, he submitted another DD 2058 to his Human Resources Office, and his leave and earnings statements were finally changed.¹²

III. Discussion

The preponderance of the evidence is that Lt. J. and the rest of his family have been residents of Alaska, with the intent to remain indefinitely, from the day they arrived in the state

⁴ Supp. Ex. 15, p. 3 (August 4); Supp. Ex. 15, p. 7 (August 11); Testimony of D. J.

⁵ Supp. Ex. 15, p. 3.

⁶ OAH No. 09-0301-PFD, Ex. 14, p. 9; Supp. Ex. 12. The Active Guard Reserve program is described in detail in Army Regulation 135-18.

⁷ *Id.* Lt. J. testified that as part of his in-processing in Alaska he submitted a DD 2058 claiming residence in Alaska. His sworn testimony is supported by statements submitted by SFC Eric O. and SSG D. E. M. There is no evidence or testimony to rebut this evidence. It is possible that such a document was filed, and that as a result of administrative error or oversight Lt. J.'s leave and earnings statements were not corrected. Whether such a document was filed is immaterial to the outcome of this case. *See* pp. 4-6, *infra*.

⁸ *See, e.g.*, Ex. 4, p. 2.

⁹ Ex. 1, pp. 6-7.

¹⁰ Ex. 7, p. 2.

¹¹ Ex. 21 (June 24, 2008, file note).

¹² Ex. 10, p. 3.

in early August, 2003. In addition to being an Alaska resident, however, to be eligible to receive an Alaska Permanent Fund dividend an individual must comply with the applicable regulations.

Among those regulations is 15 AAC 23.143(d)(2), which provides:

(d) An individual is not eligible for a dividend if, at any time from January 1 or the qualifying year through the date of application, the individual has

...

(2) claimed or maintained a claim of residency in another state...in the individual's employment personnel records; if the individual claims an error or delay was made in processing by the personnel office, the individual must submit

(a) from the personnel office, a certified copy of the individual's request to change the individual's state of legal residence; or

(b) a sworn statement from the personnel officer who has specific knowledge that the personnel office made an error, or caused a delay, in processing the individual's personnel records; the personnel officer must state the exact date the records show the original request was received and why the request was not processed timely....

In this case, it is undisputed that Lt. J.'s leave and earnings statements are employment personnel records within the meaning of the regulation, and that the leave and earnings statements listed Michigan as Lt. J.'s state of residence for income tax withholding purposes through at least May, 2007. On appeal, Lt. J. contends that he did not claim or maintain a claim of residency in another state after he moved to Alaska in 2003.

The division argues that Lt. J. is ineligible for any of the dividends at issue, because he took an "affirmative act" to claim residency in another state on July 8, 2003, and he subsequently did not "negate his residency claim to Michigan" after he moved to Alaska the following month.¹³

A. Lt. J. Did Not Claim Residency in Michigan in 2004-2006

The qualifying years for the three dividends at issue in this case are 2004, 2005, and 2006. The DD 2058 form Lt. J. submitted as part of his out-processing with the M. N. G. expressly claims legal residence in Michigan. That document, however, was not executed in one of the qualifying years for his then-current employer. When Lt. J. executed the DD 2058 in 2003, he was still a resident of Michigan and an employee of the M. N. G. Because he was not physically present in Alaska and never had been, he was not yet capable of acquiring Alaska residency.

¹³ Position Statement at 1 (August 6, 2009).

Lt. J.'s leave and earnings statements in 2004, 2005, and 2006 continued to include the letters "MI" in a box adjacent to the "State Taxes" box on the statement, but this does not establish that Lt. J. claimed residence in Michigan in 2004, 2005, or 2006. Indeed, the evidence in this case is that the A. A.N. G. would not hire Lt. J. until after he had moved to Alaska and established residency. A military leave and earnings statement can show a tax residence based on an individual's home of record, without the individual ever having claimed residence in that state.¹⁴ In this case, the evidence does not indicate whether the leave and earnings statements show Michigan as Lt. J.'s state of residence for tax purposes because that was the state of residence Lt. J. had claimed in 2003, or because that was his home of record at the time he moved to Alaska (as shown on his letter of appointment). In either event, the leave and earnings statements do not establish that Lt. J. any time in 2004 or thereafter claimed residency in Michigan.¹⁵

B. Lt. J. Did Not Maintain His Prior Claim of Michigan Residency

The central issue in this case is whether in 2004 and thereafter, Lt. J. "maintained" the claim of Michigan residence that he made in 2003 when he was employed by the M. N. G. The only evidence that Lt. J. maintained a claim of residence in Michigan after 2003 is his leave and earnings statements, which continued to list "MI" in the box adjacent to the "State Taxes" box on his leave and earnings statements. If Lt. J. were an active duty member of the United States federal armed forces, the fact that his leave and earnings statements continued to show Michigan as his state of residence for tax purposes would be sufficient to establish that Lt. J. "maintained" in his current employment records the claim of residence that he made in his 2003 DD 2058 for his employer at the time. Absent the evidence listed in 15 AAC 23.143(d)(2), a member of the United States armed forces who is transferred to Alaska under military orders generally has been

¹⁴ See, e.g., In Re K.W.B., OAH No. 09-0366-PFD at 4-5 (Department of Revenue 2009) (Alaska resident enlisted in Army in Texas while visiting friends; Texas shown as home of record and therefore as tax jurisdiction on leave and earnings statement); In Re C.R.C., et al., OAH No. 08-0497-PFD (Department of Revenue, 2009) (Coast Guard enlistee who listed Kentucky home of record upon enlistment in 2006 is eligible for 2007 dividend because he did not claim Kentucky residence); In Re M.L., Department of Revenue Caseload No. 961052 (1997) (Navy enlistee who listed Oregon home of record upon enlistment in 1994 is eligible for 1995 dividend because he did not claim Oregon residence).

¹⁵ See, e.g., In Re G.C., OAH No. 06-0747-PFD (Department of Revenue 2007) ("Failing to notice that a new employer has erroneously assigned an employee an incorrect state of legal residency is not an affirmative act, and cannot make a person ineligible."); In Re B.R., Department of Revenue Caseload No. 951596 (1997) (prior state of residence shown in Navy records after break in service and change of residence).

considered to have maintained a prior claim of residency in another state¹⁶ even if the individual took an affirmative action to disclaim residency in another state,¹⁷ although in at least one such case the department ruled that an individual who takes an affirmative action upon arrival in Alaska to disclaim residency in another state was eligible.¹⁸

But Lt. J. was not a member of the United States armed services, transferring from one duty station to another for the same employer. Rather, Lt. J. was a member of the National Guard. When he came to Alaska, Lt. J. did not simply transfer from one duty station to another with the same employer: he changed his employer. The Alaska Supreme Court has held that Alaska National Guard members are employees of the State of Alaska.¹⁹ National Guard members are thus quite different from members of the United States armed forces, who are federal employees at all times and whose transfer under military orders from one duty station to another is not a change in employers. An individual who is employed in another state and then

¹⁶ See In Re J.C.D., OAH No. 09-0414-PFD (Department of Revenue 2009) (military serviceman whose leave and earnings statement listed Washington as residence for tax purposes moved to Alaska in 2006 and did not file DD 2058 until 2007 ruled ineligible for 2008 dividend); In Re K.M.H., OAH No. 09-0198-PFD (Department of Revenue 2009) (Air Force officer whose leave and earnings statement listed Florida as residence for tax purposes prior to transfer to Alaska in 2005 and filed DD 2058 claiming legal residence in Alaska in 2008 ruled ineligible for 2008 dividend); In Re E.G., OAH No. 09-0055-PFD (Department of Revenue 2009) (Air Force service member whose leave and earnings statements list Florida as state of residence for tax purposes prior to transfer to Alaska in 2005 and filed DD 2058 changing residence to Alaska in 2008 ruled ineligible for 2008 dividend; service member “remembered filling out [DD 2058 in 2005], but does not recall whether he ever turned it in or not.”); In Re K.M.H., OAH No. 07-0689-PFD (Department of Revenue 2008) (Air Force officer whose leave and earnings statements list Florida as residence for tax purposes prior to transfer to Alaska in 2005 and filed DD 2058 changing residence to Alaska in 2007 “passively allowed her employment personnel record to reflect a claim of residency in Florida [in 2006]” and was ineligible for 2007 dividend).

¹⁷ See In Re R.M.P., OAH No. 08-0347-PFD (Department of Revenue 2008) (Air Force officer whose “military personnel records” showed Florida as “State of Legal Residence” prior to transfer to Alaska in 2005 and filed DD 2058 changing residence to Alaska in 2007 was ineligible for 2007 dividend; officer asserted that he had submitted a DD 2058 in 2005, but no factual finding that he had done so; administrative law judge rules that under these circumstances 15 AAC 23.143(d)(2) is an “absolute disqualification” absent the specific evidence listed, “[r]egardless of whether [the officer’s] current recollection of a DD 2058 in 2005 is credible.”); In Re J.C., III, OAH No. 09-0022-PFD (Department of Revenue 2009) (Air Force sergeant whose leave and earnings statement showed Florida as “State of Legal Residence” prior to transfer to Alaska in 2006 and filed a DD 2058 changing residence to Alaska in 2008 was ineligible for 2008 dividend; administrative law judge rules that “[r]egardless of whether SSgt. C’s current recollection regarding a DD 2058 in 2006 is credible, the department cannot pay him a dividend unless he provides one of the two types of proof enumerated in 15 AAC 23.143(d)(2).”).

¹⁸ See In Re T.C., OAH No. 05-0296-PFD (Department of Revenue 2005) (Air Force sergeant whose “personnel records” showed Georgia residence prior to transfer to Alaska in 2002, and on arrival verbally disclaimed that residency and “attempted to change her state of legal residency to Alaska” but did not file DD 2058 until 2003 “did not [passively] maintain a claim of residency in another state during the qualifying year [2003].”). See also, In Re R.H., Department of Revenue Caseload No. 960591 (1997) (applying former version of 15 AAC 23.143(d)(2); “The term ‘claimed residency’ includes most situations where an individual ‘maintained a claim of residency.’ But there is a limit to how far the language of 15 AAC 23.143(d)(2) can be stretched to cover completely passive behavior.”).

moves to Alaska and goes to work for a new employer does not “maintain” a prior claim of residence in his former employer’s records, rather, the new employer creates a new personnel record. Lt. J. did not “maintain” his prior claim of residence: rather, his new employer for unknown reasons (possibly because it was Lt. J.’s home of record, possibly because it relied on an outdated DD 2058 Lt. J. had submitted to his prior employer) made a unilateral decision to list Michigan as his state of residence for tax purposes. Because he did not maintain his prior claim, Lt. J. need not provide the evidence specified in 15 AAC 23.143(d)(2), and he is eligible for the 2005, 2006, and 2007 dividends.²⁰

IV. Conclusion

The division’s decision to assess Lt. J.’s dividends for 2005 and 2006 is REVERSED. Lt. J.’s application for a 2007 dividend is GRANTED.

DATED March 12, 2010

Signed

Andrew M. Hemenway
Administrative Law Judge

¹⁹ See State, Department of Military and Veterans’ Affairs v. Bowen, 953 P.2d 888, 894 (Alaska 1998).

²⁰ Because the facts of this case involve a change of employers, rather than a transfer by an employee from a duty station in another state to a duty station in Alaska, it is not necessary to decide whether an employee may disclaim a prior claim of residence by an affirmative act without providing the documentary evidence specified in 15 AAC 23.143(d)(2). See notes 16, 17, *supra*.

It is also not necessary to decide whether a member of the United States armed forces may be said to maintain a claim of residency in another state based on the taxing jurisdiction listed in a leave and earnings statement, without any evidence that the service member had previously claimed residency in the other state by filing a DD 2058. See notes 13, 14, *supra*.

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 15th day of April, 2010.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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