

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

IN THE MATTER OF)
)
 M. & C. K.)
)
2008 Permanent Fund Dividend)

Case No. OAH 09-0199-PFD
Agency No. 2008-046-5097; 2008-049-3727

DECISION

I. Introduction

Capt. M. and C. K. timely applied for 2008 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. Both Capt. and Ms. K. appeared by telephone at a formal hearing held on May 14, 2009. PFD Specialist Peter Scott represented the PFD Division by telephone.

As Alaska residents whose absences during the qualifying year were allowable under AS 43.23.008, the K.s are eligible for 2008 dividends.

II. Facts

Capt. K. is a dentist. He and Ms. K. came to Alaska in 1995 when Capt. K. was transferred to Fairbanks by the U.S. Public Health Service. In 1997 the K.s bought a house in Fairbanks. At some point they also bought a parcel of undeveloped land located outside of Fairbanks. As Capt. K. advanced up the ranks of the Public Health Service, his work became increasingly supervisory and administrative, to the point where he was only working as a clinical dentist about one day per week. Wishing to spend more time in the active practice of dentistry, Capt. K. applied for a transfer to the U.S. Coast Guard. Upon approval of the transfer, Capt. K. was ordered to report to his new duty station in North Bend, Oregon, on January 16, 2007. When he donned a Coast Guard uniform, Capt. K. became subject to the Uniform Code of Military Justice. Capt. K. is subject to assignment to any duty station at which the Coast Guard requires his service, including aboard ships in the Persian Gulf or in active war zones. Though he serves as a Coast Guard officer, Capt. K.’s leave and earning statements continue to be issued by the Public Health Service.

After traveling back and forth between Alaska and Oregon a few times, Ms. K. joined her husband in Oregon later in 2007. Both of the K.s were absent from Alaska for more than 180 days in 2007. Upon moving to Oregon, the K.s sold their house in Fairbanks and bought a house in Oregon. The K.s testified that they ultimately plan to build a house on their undeveloped land, and

they did not wish to be absentee landlords of the Fairbanks house. As a hobby, Ms. K. raises and shows Rhodesian ridgebacks, and she typically keeps four to six dogs in her home. This hobby precluded the K.s from renting while in Oregon. For these reasons, the K.s decided to buy a home in Oregon, and then sell it when they return to Alaska. The K.s own a boat that they maintain in Valdez. During his absence, Capt. K. has paid to remain on a waiting list for a permanent moorage space in Valdez.

Capt. K. testified that he is eligible to retire in January, 2012, and that he intends to retire as soon as he is eligible. Both of the K.s testified that they intend to return to Alaska upon Capt. K.'s retirement and to build a home on their land. Captain K. testified that he has maintained his license to practice dentistry in Alaska, but he has not obtained a license to practice in Oregon and does not plan to. Thus, his practice in Oregon is limited to work within his Coast Guard duties. Capt. K. testified that after he retires he plans to practice dentistry in Fairbanks on a part-time basis.

III. Discussion

a. Burden and standard of proof

At a formal hearing, the person who has requested the hearing has the burden of proving that the division's action was incorrect.¹ The standard of proof is preponderance of the evidence.² To prove a fact by a preponderance of evidence, a party with the burden of proof must show that the fact more likely than not is true.³ The division asserts that "by regulation, at the formal hearing level the appellant has the burden of overcoming the presumption that they are ineligible."⁴ While the applicant has the burden of bringing evidence to the hearing to be considered, the division's statement that there is a general legal presumption of ineligibility is unsupported and incorrect.

b. Captain K. is a member of the armed forces

In order to qualify for a permanent fund dividend, the applicant must have been physically present in Alaska all through the qualifying year, or if absent, absent only as allowed by AS 43.23.008.⁵ That statute allows absences for Alaskans serving on active duty in the armed forces, and for Alaskans accompanying, as a spouse, eligible Alaskans serving on active duty in the armed forces.⁶

¹ 15 AAC 05.030(h).

² 2 AAC 64.290(e).

³ *Id.*

⁴ Division's *Formal Hearing Position Statement* at 6.

⁵ AS 43.23.005(a)(6).

⁶ AS 43.23.008(a)(3).

The division correctly points out that members of the Public Health Service are not members of the “armed forces.” Captain K. concedes the point, but argues that he is now a member of the Coast Guard, in spite of the fact that his leave and earning statements are issued by the Public Health Service. In a similar case, the commissioner issued a decision in 2002 addressing this argument:

Congress has passed a number of laws that permit members of the PHS to be detailed to the Coast Guard, where they serve as active duty members of the Coast Guard. In 1985 PHS and the Coast Guard executed a memorandum of agreement providing for detail of PHS officers to the Coast Guard. This is a lengthy document, but to summarize it seems that the Coast Guard lacks the resources to provide professional oversight of medical personnel. When PHS details officers to the Coast Guard, the U.S. Surgeon General provides professional oversight of the officers. However, for all other purposes, the Coast Guard supervises them. Thus, if there were a question of medical malpractice, the Surgeon General would investigate. If there were a question of a person being AWOL or not following orders and regulations, the Coast Guard would investigate. PHS determines what a Coast Guard doctor or pharmacist should get paid, and it cuts the checks. But the Coast Guard gives the orders.

A careful reading of the applicable laws and the agreement between the Coast Guard and the Public Health Service show that medical officers detailed to the Coast Guard are essentially members of the Coast Guard, not merely service providers in the nature of a contractor. The legal workings are complicated, but I find two federal statutes to be particularly significant. 42 USC 215(a) reads in part: “Officers detailed for duty with the Army, Air Force, Navy, or Coast Guard shall be subject to the laws for the government of the service to which detailed.” 10 USC 802(a)(8) includes “members of the...Public Health Service...when assigned to and serving with the armed forces” among persons subject to the Uniform Code of Military Justice.

In addition, a 1990 amendment to the Memorandum of Understanding between the Coast Guard and PHS provides that in the event of mobilization of the Coast Guard or transfer of the Coast Guard to the Navy, the PHS detail to the Coast Guard will continue. The agreement provides that the Coast Guard will pay for all travel, per diem and other costs associated with mobilization training, but the PHS will pay other costs, primarily officers’ pay. Thus, if there were a war, and the Commander-in-Chief ordered transfer of the Coast Guard to the command of the Navy, Lt. Cdr. [M.] would be duty-bound to serve as an officer of the Navy, and go to whatever place on the globe his orders directed him to serve in the war.

As a PHS officer detailed to the Coast Guard, Lt. Cdr. [M.] wears a Coast Guard uniform, he is required to salute, he takes orders from his Coast Guard superiors, and in the event he does not obey his orders, he is subject to court martial. In wartime, Lt. Cdr. [M.] is as subject to being shipped overseas for combat duty as any medical officer in the United States military. I find it difficult to accept that an officer with these duties is anything other than an officer on active duty in the armed forces. Lt. Cdr. [M.]’s LES may come from the PHS, and it is true that PHS officers are not necessarily members of the armed forces. But Lt. Cdr. [M.], upon joining the PHS, went a step further and also joined the Coast Guard. I find as a matter of fact that Lt. Cdr. [M.] is an active duty member of armed forces,

specifically the Coast Guard. As such, he is entitled to claim an allowable absence while he serves, and he is therefore eligible for 1999, 2000, and 2001 dividends. His spouse is eligible for these same dividends under AS 43.23.008(a)(13).

There is an unfortunate result of this decision, that it adds to the PFD Division's already staggering workload another element of inquiry in sorting applications. The Division is, of course, best at determining the most efficient method to process applications, but I would make one suggestion. PHS officers detailed to the armed forces are given military orders and advised that they are subject to the Uniform Code of Military Justice. Lt. Cdr. [M.]'s transfer order from the Surgeon General reads in part, "You are subject to the Uniform Code of Military Justice. This is notification of official orders issued by the U.S. Coast Guard." In its requests for further information, the Division might ask applicants to provide proof they are under command of a branch of the armed forces and subject to the Uniform Code of Military Justice. Truly qualified applicants should be able to produce copies of these orders very easily, as Lt. Cdr. [M.] did.^[7]

This discussion resolves the principal issue in this case. Capt. K. has provided proof that he has been detailed to the Coast Guard and is subject to the Uniform Code of Military Justice. As the commissioner's previous decision indicates, this evidence should have been sufficient to obviate the need for a formal hearing on this issue. Regardless of whether career considerations influenced his decision to join the military, Capt. K. has sacrificed his civil rights and risked the possibility of being put in harm's way in order to serve the nation as a member of the armed forces. Capt. K.'s absence was allowable. Ms. K.'s absence as an accompanying spouse was allowable.

c. The K.s have remained Alaska residents

In order to be eligible for permanent fund dividends, the applicants must have remained Alaska residents at all times during their absences.⁸ Alaskans who are absent from the state remain residents unless they establish or claim residency in another state, or are absent under circumstances that are inconsistent with the intent to return to Alaska to remain indefinitely and make a home.⁹

The division asserts that "a military applicant, who specifically requests and is granted a PCS, or transfer out of Alaska, is ineligible for a Permanent Fund Dividend."¹⁰ The division has not cited authority for this rule. A request to be transferred out of Alaska may obviously be considered as evidence that a person does intend to return to Alaska to remain indefinitely and make a home, but there is no applicable regulation or statute stating that a person requesting a military "permanent change of station," or transfer out of Alaska, is automatically ineligible for a dividend.

⁷ *ITMO P.&S. M.*, caseload 010665 (Dept. of Revenue, June 2002).

⁸ AS 43.23.005(a)(2)-(3).

⁹ AS 01.10.055(c).

¹⁰ Division's *Formal Hearing Position Statement* at 5.

Capt. K. explained that his request was more in the nature of a request to transfer into the Coast Guard to work as a dentist than a request to transfer out of Alaska. While Capt. K. knew that the position he was seeking would require his relocation to Oregon during at least the initial period of his service, his objective was to spend more time working as a clinical dentist rather than as an administrator. Capt. K. was a credible witness on this point.

By the division's reasoning, all Alaskans who join the military knowing they will be stationed outside of the state would be ineligible for dividends. Capt. K. presented credible evidence that he joined the Coast Guard knowing he would be absent for a period of five years, and that he maintained the intent to return to Alaska at a certain time, when he becomes eligible for retirement. Besides the credibility of the testimony offered by both applicants, Capt. K.'s maintenance of his professional credentials in Alaska, his decision not to obtain such credentials in Oregon, and the K.s' ownership of the land they plan to build on in Alaska are particularly persuasive evidence that the K.s have maintained the intent to return to Alaska. While the sale of their house in Fairbanks and the purchase of a house in Oregon initially appear to contradict the K.s' intent to return to Alaska, their explanations of the reasons for these transactions are credible, logical, and consistent with their intent to return to Alaska to make their home.

IV. Conclusion

Capt. K. was allowably absent during the qualifying year as a member of the armed forces on active duty. Ms. K. was allowably absent as the spouse of an eligible resident on active duty in the armed forces. The K.s have remained Alaska residents during their absence.

The applications of Capt. M. and C. K. for 2008 permanent fund dividends shall be GRANTED.

DATED this 19th day of May, 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 16th day of June, 2009.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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