

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

In the Matter of:	)	
	)	
K. A. P.	)	
	)	OAH No. 09-0274-PFD
<u>2008 Permanent Fund Dividend</u>	)	Agency No. 2008-058-6509

**DECISION**

**I. Introduction**

Master Sergeant K. A. P.<sup>1</sup> timely applied for a 2008 permanent fund dividend (PFD). Ms. P. has been posted outside Alaska since May 2002 and has returned for only eight days falling short of the thirty-days-in-five-years threshold that is usually required to preserve PFD eligibility. The Permanent Fund Dividend Division applied the presumption of ineligibility for people absent from the state more than five years who do not return for a total of thirty days in the five years, and denied her application initially and at the informal appeal level. At Ms. P.’ request, a formal hearing was held on June 30, 2009. The division’s denial is affirmed because Ms. P. has not submitted evidence sufficient to rebut the presumption of ineligibility that stems from her absence in excess of five years.

**II. Facts**

The facts of this case are not in dispute, the sole issue being their legal significance. Unless otherwise attributed, the facts set out below are based on testimony at the hearing and the exhibits in the file.

Ms. P., her husband (also in the military) and two sons were transferred to Alaska in June 1995. In May 2002, they were transferred out of state. Since leaving she has returned to Alaska twice, each time for four days. Ms. P. is presently assigned to a military base in Illinois and plans on retiring August 2010. She has not requested reassignment to Alaska because the odds of being reassigned are slight and taking another assignment would require her to go beyond her retirement date. Ms. P. has maintained paper ties with Alaska: although she has not voted, she is registered to vote in Alaska; her vehicle is registered in Alaska; she has an Alaska driver’s license; and she lists Alaska as her legal state of residence on her Leave and Earnings Statement.

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<sup>1</sup> Ms. P.’ rank is derived from her Air Force pay grade, E-7. Exhibit 2 at 2.

As of the date of hearing, Ms. P. and her husband were in the process of finalizing their divorce and dividing property. They own two four-plex rental properties in Anchorage and a residence in Illinois. When they left, they had planned to keep their Anchorage residence as a rental property, but it did not work out and the residence was sold. Ms. P. believes she will receive the residence in Illinois and the Anchorage rental properties in the property settlement. She has two sons, one is eighteen years old and the other is thirteen years old.

Ms. P. is a registered nurse. Upon retirement it is her plan to return to Alaska to manage the rental properties and obtain employment as a nurse. At the time of hearing she had not started the process to obtain licensure as a registered nurse in Alaska nor had she started to look for employment. When asked why she wanted to return to Alaska, Ms. P. responded that it was safe, a good place to raise kids, low incidence of gang activity, and her older son's asthma was better when they lived in Alaska. However, she does not expect that her oldest son will return with her to Alaska.

When asked why she had not returned to visit Alaska more often or extended her two visits, Ms. P. explained that she and her husband took extensive periods of leave to care for an ailing parent. When the parent passed away in 2005, they had minimal personal leave and debt from medical bills. Travel to Alaska was expensive and she could not afford to return more often. When she did return she could not extend her stay because of the children's school and because she was saving her leave to use prior to retirement. Ms. P. was unaware of the 30-day/five year presumption, but it is unclear whether that would have influenced the amount of time she spent in Alaska.

### **III. Discussion**

A person requesting a formal hearing has the burden of proving that the division's decision was in error.<sup>2</sup> The Department of Revenue ("Department") supports an individual's choice to serve in the military and does not believe a person should be forced to choose between service to their country and maintaining their Alaska residency for PFD eligibility purposes. The applicable statutes and the Department's regulations addressing physical presence in Alaska balance an individual's choice to serve with objective indicia of residency.

An otherwise eligible individual remains eligible for a PFD if that person was absent serving on active duty as a member of the armed forces or accompanying that person as a spouse or

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<sup>2</sup> 15 AAC 05.030(h).

dependent;<sup>3</sup> however, to qualify for a PFD, such a person must be an Alaska resident throughout the qualifying year and at the date of application.<sup>4</sup> A person establishes residency in Alaska by being physically present in the state with the intent to remain indefinitely and to make a home in the state.<sup>5</sup>

Most allowable absences are not without limits. The law imposes presumptions about an individual's intent to return to Alaska. The law also requires that, when determining whether an individual has maintained the requisite commitment to return to Alaska at all times during an absence of many years, intent is measured by certain objective criteria rather than a simple assessment of the credibility of the individual asserting that he consistently maintained that commitment.

By law, there is a presumption that a person who has been allowably absent for more than five years is not an Alaska resident anymore.<sup>6</sup> It is rare that a PFD applicant who spends the majority each year outside for more than five consecutive years is able to overcome the presumption that he or she has not maintained the intent to return to Alaska at all times during his or her absence. The law makes it especially difficult to overcome the presumption if the individual "has not been physically present in Alaska for at least 30 cumulative days during the past five years."<sup>7</sup>

The regulation at 15 AAC 23.163(f) establishes a presumption that any person who is absent from the state (other than for a reason relating to Congressional service) for more than five consecutive years "is presumed not to have the intent to return to Alaska and remain indefinitely in Alaska." The presumption is rebuttable. However, 15 AAC 23.163(h) provides that "the department will generally consider" the presumption un rebutted when an individual has not visited the state for at least 30 cumulative days during the five-year period. This provision establishes, in effect, a presumption within the presumption that makes it extraordinarily difficult for a person who lives outside Alaska and visits fewer than 30 days in five years to retain eligibility for a dividend.

The regulation at 15 AAC 23.163(h)(2) provides that the 30-day presumption does not apply if "unavoidable circumstances" prevented the individual from returning for 30 days. Here, the five-year period during which Ms. P. needed to make 30 days of visits to avoid the presumption ran from 2002 through 2007. Ms. P. returned to Alaska twice during this five year period. Each visit was for

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<sup>3</sup> AS 43.23.008(a)(3).

<sup>4</sup> AS 43.23.005(a)(2), (3).

<sup>5</sup> AS 01.10.055(a).

<sup>6</sup> 15 AAC 23.163(f).

<sup>7</sup> 15 AAC 23.163(h)(2).

four days for a total cumulative presence of eight days. Her reasons for not returning were not “unavoidable.” Unavoidable circumstances have been found to exist where the ability to return to Alaska was beyond an applicants control such as deployment overseas with no opportunity for leave.<sup>8</sup>

An “unavoidable circumstance” is something more than a having to choose between two options; it is a force precluding an applicant from even having the option to choose. Such was the case in *In re I. H. et al.*, Caseload No. 020683 (Alaska Department of Revenue 2003). In *In I. H. et al.* the applicants were a military family who had lived in Alaska until Mr. H. was stationed in Europe. During the time in question they returned to Alaska for one seven day visit. Aside from the expense and hassle of traveling with four young children to and from Europe, Mr. H. argued convincingly that his military duty prevented him from returning. He established that he had unique skills in an undermanned area of the Navy and he was only rarely able to take leave. He demonstrated that in one year he took three days of leave, lost 25 days of unused leave, cashed in 45 days of accumulated leave and carried the maximum allowable 60 days forward to the next year. His leave requests were denied five times; he had been advised that he would not be granted more than a 14 day block of leave, if leave was possible. The Administrative Law Judge found that Mr. H. had demonstrated that the requirements of his service prevented him from taking even a normal amount of leave.

In *In re S.H. et al.*, Caseload No. 030093 (Alaska Dep’t of Revenue 2003), the applicant, an active duty member of the Air Force, and his wife had lived in Alaska for six years until he was assigned to a duty station outside of Alaska. During their absence, he and his wife maintained their Alaska drivers’ licenses, remained registered to vote and contributed to the University of Alaska college savings plans for their daughters. Mr. H. was a registered professional who only maintained his license in one state, Alaska. He listed Alaska as his state of legal residence on his LES, and kept Alaska bases at the top choices on his dream sheet. During a period of 5 years’ absence from Alaska, the family had returned to Alaska for a total of 28 days. In upholding the division’s denial of the family’s applications, the Administrative Law Judge reasoned:

Mr. H. has shown that his Air Force duty has made it “impractical” to return more often, and he has shown that returning to Alaska is extremely expensive and inconvenient. He has not shown that unavoidable circumstances prevented him from making more frequent returns. Only that to do so would

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<sup>8</sup> *In re V. V. et al.*, OAH No. 07-0104-PFD (2007).

be difficult and expensive. . . While [Mr. H.] did identify a number of factors that do suggest continuing Alaska residency, the division was also correct to discount these factors somewhat under subsection (h)(1) because of the infrequency and short duration of Mr. H's returns to Alaska.<sup>9</sup>

Ms. P.' circumstances are less favorable than those presented in *In re S. H. et al.*, Ms. P. was not deployed overseas. She was present in Alaska for only six days. Her reasons for not staying longer or visiting Alaska more often focused on the expense, the difficulty of coordinating leave with family obligations and children's school schedules. Ms. P.' situation made it impractical to return to Alaska but she has not shown that unavoidable consequences prevented her or other family members from returning to Alaska for at least 30 cumulative days during the past five years. Therefore, the presumption applies.

The department's regulations provide a list of seven factors that it will consider, where applicable, in determining whether the applicant has rebutted the presumption.<sup>10</sup> The factors are reviewed below:

1. *Length of absence compared to time in Alaska before departing.* These two time periods are almost equal. If Ms. P. returns as planned in August 2010, the length of the absence will have exceeded the time spent in Alaska.

2. *Frequency and duration of return trips to Alaska.* Ms. P. has returned to Alaska a total of eight days in over five years. The timing and length of return trips indicate that they were intended to satisfy another eligibility requirement, being present in state 72 hours every two years rather than a voluntary trip because of a desire to spend time in Alaska.<sup>11</sup>

3. *Whether intent to return is conditioned on future events beyond the individual's control, such as economics or finding a job in Alaska.* Ms. P. does plan to work following her military retirement, and so in a sense her return is contingent on being able to find a job here. However, she plans to work as a registered nurse and the demand for her skill set make her employment prospects good.

4. *Any ties the individual has established outside Alaska (homes, taxes, voter registration, etc.).* Ms. P. owns a house in Illinois which she plans to sell and if she cannot sell the house she will rent it. She does not believe there will be any difficulty renting the house as it is close to a military base.

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<sup>9</sup> *In re S. H. et al.*, Caseload No. 030093 (Alaska Dep't of Revenue 2003).

<sup>10</sup> 15 AAC 23.163(g).

5. *Priority the individual gave Alaska in employment assignment preference.* Ms. P. has not requested reassignment to Alaska because she intends to retire. Based on Ms. P.' testimony, this appears reasonable. Her failure to request an assignment to Alaska is given little if any weight.

6. *Whether the individual chose a career path that does not allow return to Alaska.* This is not true of Ms. P. in the long run; a military career is conducive to retirement during middle age so that a second career can be pursued in the location of choice. Of course, service in the military can place a short-term impediment on return to Alaska, but it is unlikely that this regulatory factor was intended to cut against members of the military on account of that obvious consequence of military service.<sup>12</sup>

7. *Ties to Alaska such as real property, voter registration, etc.* Ms. P. and her husband have rental properties in Alaska, no residential property. Ms. P.' military records show Alaska as her state of legal residence. She has not established significant ties with any other state or country. Ms. P. does maintain paper ties to Alaska.

Most of the factors are neutral. However, most damaging to Ms. P. appeal is that she only returned to Alaska twice and each time it was for four days. Her failure to return was not due to unavoidable circumstances. The Department's regulations direct that when considering whether an individual has rebutted the presumption it will give greater weight to the claim of an applicant "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>13</sup> Taking all of these factors into account Ms. P. has not rebutted the presumption created by an absence exceeding five years.

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<sup>11</sup> AS 43.23.005(a)(4) requires that an applicant have been physically present in Alaska for at least 72 consecutive hours at some time during the prior two years before the current dividend year.

<sup>12</sup> To discriminate against military members because of their "career choice" would be difficult to square with legislative intent, the legislature having gone out of its way to protect the eligibility of people choosing this career path. See AS 43.23.008(a)(3).

<sup>13</sup> 15 AAC 23.163(h)(1).

**IV. Conclusion**

Ms. P. has not rebutted the presumption that an individual whose allowable absence totals more than five years no longer has the intent to return to Alaska and remain indefinitely. Therefore, the division correctly denied Ms. P.' application for a 2008 PFD.

DATED this 21st day of October 2009.

By: Signed  
Rebecca L. Pauli  
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 17th day of November 2009.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Deputy Chief Administrative Law Judge  
Title

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