

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

IN THE MATTER OF)
)
 K. W. B.)
) Case No. OAH 09-0366-PFD
)
2007 Permanent Fund Dividend)

DECISION & ORDER

I. Introduction

K. W. B. timely applied for a 2007 permanent fund dividend. The Permanent Fund Dividend Division determined that Mr. B. was not eligible, and it denied the application initially and at the informal appeal level. Mr. B. requested a formal hearing by correspondence. Administrative Law Judge Mark T. Handley reviewed the appeal. The administrative law judge finds that Mr. B. does qualify for a 2007 dividend.

II. Facts

Mr. B. was born and raised in Alaska. He attended R. U. in New Jersey and served as an intern on No Name senator's staff before he enlisted as an active-duty member of the Army.¹

After graduating from R., Mr. B. returned to Alaska. At that time, his plan was to work for his parents in Alaska for a few months, then either join the Army, or work full-time for No Name senator's Office. While visiting some friends in Texas, Mr. B. also visited a local Army recruiting office in Texas. Mr. B. explained his interest in attending Officers Training School to the recruiter. Mr. B. was impressed with the assistance and information that the Texas recruiter provided to him.²

Mr. B. returned to Alaska after his trip to Texas. Mr. B. interviewed with No Name senator's Office, but was not able to get the job that he wanted. Mr. B. then visited an Army recruitment office in Alaska, but found the recruiters there to be much less helpful and unwilling to provide him with the guarantees that the recruiter that he had spoken with in Texas had offered. Mr. B. enlisted in Texas, passed the review board there to get into Officers Training School, and returned to Alaska to finish the work he was doing for his parents before he reported for duty in Ft. Benning, Georgia.³

Upon reviewing Mr. B.'s military leave and earning statement (LES), the Division found that Mr. B.'s state of legal residence was listed as Texas. Texas does not have any income tax, so

¹ Exhibit 6, p. 3.

² Exhibit 6, p. 3.

³ Exhibit 6, p. 3.

the Army had not been withholding state income tax for Texas. In his request for an informal appeal, Mr. B. indicated that he believed that the fact that his LES contained a reference to Texas merely meant that this is where the Army will send him when he separates from active duty. Mr. B. explained that he had never claimed to be a Texas resident, that he had enlisted in Texas because the recruiter there was able to offer him a better chance of getting into Officers Training School and getting the GI bill than the recruiters he talked to in Alaska, but that he had no significant connections to Texas.⁴

Mr. B.'s enlistment, payroll records and Officer Record Brief indicate that Mr. B.'s "home of record" was identified as Texas at enlistment, and that he was able to have his "home of record" changed to Alaska, but not before the Army payroll office put him under Texas tax law for income withholding purposes by default. This resulted in "TX" appearing in a box on Mr. B.'s LES without his ever having made a claim to be a resident of Texas.⁵ Once Mr. B. understood the significance of that the Division placed on having Texas on his LES and that he could change it to Alaska, Mr. B. filed the appropriate form to claim Alaska as his "State of Legal Residence."⁶

The Division asserted in its position paper that Mr. B. filed a DD Form 2058 with the Army on which he claimed Texas as his "State of Legal Residence." The Division does not cite to any document in the record or admission by Mr. B. with this assertion.⁷ Furthermore, there is no copy or record of such a document in the record. The Division appears to have assumed that Mr. B. filed a DD Form 2058 with the Army on which he claimed Texas as his "state of legal residence" based on the undisputed fact that "TX" appears on his LES. The instructions on the DD Form 2058 in the record, which Mr. B. filed claiming Alaska as his "state of legal residence" show that this assumption is unwarranted, given the military's stated policy of applying the tax laws of a service member's "home of record" to the service member's pay if the service member fails to claim a "State of Legal Residence."⁸

⁴ Exhibit 4, p. 5-9.

⁵ See DD Form 2058 at Exhibit 15, p. 15.

⁶ See DD Form 2058 at Exhibit 15, p. 15.

⁷ See Division's position paper at page 3. The Division speculates on Mr. B.'s motives for claiming Texas residency on a DD Form 2058 without citing to any evidence showing that he did so. The Division also asserts that "the record clearly indicates" that Mr. B. claimed Texas residency in his enlistment paperwork without citing to where these indications are to be found in the record. The cases cited by the Division after these assertions in support of its position are simply not on point, as they are cases in which the applicant had been a resident of another state and undisputedly claimed residency in their prior home state for their military pay records. The issue in those cases was whether the applicants had timely changed their claimed residency to Alaska after they had become Alaska residents. The evidence in the record shows that Mr. B. has always been an Alaska resident and has never claimed to be a resident of another state with the military.

⁸ See DD Form 2058 at Exhibit 15, p. 15.

III. Discussion

A person cannot be eligible for a 2007 Alaska PFD if they made or maintained a claim of residency in another state in their employment records during the qualifying year, 2006. This requirement is found in Alaska Regulation 15 AAC 23.143(d)(2).

There are two very closely related, but distinct, concepts that come into play in this case: “residency” and “eligibility.” A person can be a resident but not eligible for a dividend. This is the case when a resident travels for unallowable reasons for more than 180 days in the qualifying year, but has every intent to return to Alaska and establishes no ties to any other state. The person remains an Alaska resident, but is not eligible for a dividend. On the other hand, nobody can be eligible without being a resident.

15 AAC 23.143 has a number of subsections, most of them dealing with residency. However, subsection (d) does not mention “residency,” only “eligibility.” While one might interpret the context to mean that the two concepts are interchangeable, when one looks at the PFD statute it is clear they are not, as the example of the resident traveling for 181 days illustrates. Subsection (d) identifies fifteen situations in which the Division need not even inquire whether a person is a resident, because he is simply not eligible. Most of these situations involve obtaining benefits from other states that are only available to residents of those states. Many parts of subsection (d) seem to be aimed as much at preventing “double dipping” as determining residency. The regulation makes clear that Alaska will not tolerate a person claiming residency somewhere else when it is beneficial, and then claiming residence here when dividends are being passed out. The regulation prohibits the Division from even considering a person’s claim to be an Alaskan when he or she is voting somewhere else or invoking the jurisdiction of other courts based on residency in other states.

The Division argues that Mr. B. maintained a claim of residency in Texas in his employment personnel records during a portion of calendar year 2006, the qualifying year for a 2007 dividend, and on the date of application. The Division also argues Mr. B. did not meet the definition of “state resident” as it applies to the Permanent Fund Dividend Program during a portion of the qualifying year and on the date of application.

A “state resident” is someone who is physically present in the state with the intent to remain indefinitely under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055. Under AS 01.10.055, a person becomes an Alaska resident by being physically

present in the state with the intent to remain indefinitely and to make a home in the state. Having established residency, a person remains a resident while absent unless she establishes or claims residency somewhere else, or performs acts that are inconsistent with the intent to remain a resident.

The evidence in the file supports Mr. B.'s assertion that he intends to return to Alaska and that he has not taken action inconsistent with the intent to remain a resident. Mr. B.'s decision to enlist in Texas rather than Alaska does not show that he is not an Alaska resident. A recruit is not required to be a resident of the state where the enlistment office is located in order to enlist at that office. The evidence shows that Mr. B. is an Alaska resident. The remaining issue is whether Mr. B. is ineligible because he claimed or maintained a claim of residency in his employment personnel records.

This case also involves two very closely related, but distinct types of military personnel payroll status categories. The military maintains two different types of status that relate to state payroll records for income tax withholding: "state of legal residence" and "home of record."

A soldier's "home of record" is generally the place he was when he joined the military, but it is not necessarily the soldier's "state of legal residence," although the personnel office will use it for state tax withholding in default of a claim of specific state legal residence being made by filing the proper form. A "home of record" generally cannot be changed, except when a soldier reenlists. The primary significance of one's "home of record" is that it is the place the military will ship the soldier, and the soldier's belongings, upon separation from service.⁹

A soldier's "state of legal residence" is the state where the soldier claims that his domicile is located.¹⁰ A soldier's "state of legal residence" is usually the state that appears on a service member's LES. Usually this is the state that the soldier has declared to be his "state of legal residence" on the proper form. State of legal residence can be easily claimed or changed by filling out and submitting this form called a DD Form 2058.¹¹ If, however, the soldier has never claimed a "state of legal residence" by filing a DD Form 2058, or if the Army does not have such a form on file when it sets up the soldiers payroll information and issues his first LES, the Army uses the state of the soldier's "home of record" for state tax withholding purposes and indicates this with the abbreviation of the state in a box in the LES.¹²

The DD Form 2058 provided by the Applicant provides:

⁹ See DD Form 2058 at Exhibit 15, p. 15.

¹⁰ See DD Form 2058 at Exhibit 15, p. 15.

¹¹ See DD Form 2058 at Exhibit 15, p. 15.

¹² See DD Form 2058 at Exhibit 15, p. 15.

Disclosure is voluntary. If not provided, state income taxes will be withheld based on the tax laws of the State previously certified as your legal residence, or in the absence of a prior certification, the tax laws of the applicable state based on your home of record.¹³

Due to the default military payroll process described on the form DD Form 2058, it is not uncommon for Alaskans who enlist in another state to end up with that other state, rather than Alaska, on their LES, despite efforts to explain to their employer that they are Alaska residents. Some Alaskans enlist in another state because there are limited recruiting offices for the branch of the service that they are interested in close to where they live in Alaska. As a result, their PFD are initially denied, but the denials are overturned once the facts explaining how the other state's abbreviation showed up in a box their LES are understood.¹⁴

A soldier's "state of legal residence" is particularly relevant to his PFD claim, not only because filing a DD Form 2058 involves a claim of state residency, but also because there are sometimes tax or other economic advantages associated with having a person's legal residence in another state.

In this case there is no indication that Mr. B. received any benefit or penalty for having "TX" on his LES that would have made him aware that this designation had any significance. It appears that Mr. B. was unclear about what these two different designations, "home of record" and "state of legal residence", mean and that is why he found it so frustrating trying to figure out why the Division had denied his PFD.

One can determine the effect of 15 AAC 23.143(d)(2) on this case by simply applying the language of the regulation:

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

* * * * *

(2) claimed or maintained a claim of residency in another state or country in the individual's employment personnel records; if the individual claims an error or a 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

¹³ Exhibit 15, p. 15.

¹⁴ See for example, Caseload Numbers 010271, 961052 & 960591.

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

The language of 15 AAC 23.143(2)(A) and (B) clearly applies only to situations in which a person claims to have changed residency to Alaska from some other state. Subparagraph (A) requires production of a “copy of the individual’s request to change the individual’s state of legal residence.” Mr. B. cannot comply with this requirement because he never requested a change. He enlisted as an Alaskan to begin with. In the alternative, subparagraph (B) requires a personnel officer to explain why a “request was not processed timely.” Again, timeliness of processing any request to change residency is not an applicable issue in this case because Mr. B. never requested a change in his residency.

Mr. B. never claimed to be a resident of Texas. His explanation that he has never had any connections with that state is supported by a preponderance of the evidence in the record. "Home of record" is not the same as “state of legal residence.” "Home of record" designates the address that the military must provide transportation to at the conclusion of a tour of duty.¹⁵ Having a state other than Alaska as "home of record" is not a claim of residency in another state, and does not disqualify a soldier from PFD eligibility. In fact, many eligible Alaskans on active duty have a "home of record" outside Alaska, because they enlisted or reenlisted in another state before they became Alaska residents.

Mr. B. need not provide a written statement from the Army acknowledging that it erred when it listed Mr. B.’s state of legal residence to be Texas instead of Alaska, because no delay or error was made. By default, rather than an error or a claim of state residency, Mr. B.’s LES showed that the Army was using Texas tax law for his income withholding, that is, no withholding for state tax, the same as Alaska tax law.

If Mr. B. had at one time claimed to be a Texas resident, and the question was when he changed his residency to Alaska, 15 AAC 23.143(d)(2) would require Mr. B. to demonstrate when he changed his residency, and to specifically document any error or delay in processing the change. In this case, there has never been any change. The evidence shows that the Army probably listed Texas on Mr. B. precisely because he never filed a DD Form 2058. The Army therefore had no claim of a state of legal residence for Mr. B. on file and therefore put the state of his “home of record” on his LES for state tax withholding purposes. Mr. B. explained that when he enlisted he

¹⁵ See DD Form 2058 at Exhibit 15, p. 15.
OAH 09-0366-PFD

claimed to be a resident of Alaska. Unless there is some reason to suspect that Mr. B. claimed to a resident of Texas, it is self-evident that the Army probably used Texas for withholding by default.

While the Army put “TX” on Mr. B.’s LES, Mr. B. never claimed to be a resident of another state on his original enlistment papers or later, nor did he maintain a claim of residency in another state. Mr. B. did not understand these payroll rules, but correctly assumed that, in his case, “TX” on his LES was only an indication of his “home of record.” He did not understand that he could have claimed his “state of legal residence” which would have change the “TX” designation on his LES to “AK.” There are no other obstacles to Mr. B.’s eligibility for a 2007 dividend.

IV. Conclusion

Mr. B. has remained an Alaska resident at all relevant times. He did not claim to be a resident of another state or maintain such a claim in his employment records. His application for a 2007 dividend should be granted.

V. Order

IT IS HEREBY ORDERED that the application of K. W. B. for a 2007 permanent fund dividend be GRANTED.

DATED this 8th day of September, 2009.

By: Signed
Mark T. Handley
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 6th day of October, 2009.

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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