

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

IN THE MATTER OF )  
H. J. N. ) Case No. OAH 09-0419-PFD  
)  
2008 Permanent Fund Dividend )

**DECISION & ORDER**

**I. Introduction**

H. J. N. applied for a 2008 permanent fund dividend (PFD). The Permanent Fund Dividend Division (Division) determined that Ms. N. was not eligible, and it denied her application initially and at the informal appeal level. Ms. N. requested a formal hearing by correspondence.

Administrative Law Judge Mark T. Handley was appointed to review and decide Ms. N.'s appeal. Ms. N. did not file any additional documents before the deadline. Bethany Chase represented the Division and filed a position paper.

The administrative law judge concludes that Ms. N. is eligible for a 2008 PFD because she was an Alaska resident attending college full-time, even though before she applied for a 2008 PFD; (1) she was absent from Alaska with her spouse, who was not eligible for a 2008 PFD; (2) she had already begun to maintain her principal home outside Alaska; and (3) she had accepted full-time, permanent employment.

**II. Facts**

Ms. N. grew up in Alaska and married a member of the U.S. Armed Forces who was stationed in Alaska and became an Alaska resident. Unfortunately, Ms. N.'s husband did not qualify for a 2008 PFD, because he did not change his state of legal residence on his employment records until July 9, 2007. Ms. N. was married on July 22, 2007.<sup>1</sup> Ms. N. admitted that she left Alaska on August 19, 2007 with her husband, whose duty station was changed to Maryland by the military.<sup>2</sup> In Maryland, Ms. N. and her husband rented a duplex. In the fall of 2007, and in the spring of 2008, Ms. N. was enrolled as a full-time nonresident student in Maryland. Ms. N. became a part-time student in March of 2008. Ms. N. received a special tuition rate because of her husband's active-duty status. On January 28, 2008, Ms. N. also began to work full-time in

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<sup>1</sup> Exhibit 1, p. 3.

<sup>2</sup> Exhibit 5, p. 3 & Ex. 6, p. 4.

Maryland. Ms. N. claimed Alaska as her state of legal residence with her Maryland employer in 2008.<sup>3</sup> Ms. N. maintained her Alaska driver's license and voter registration.<sup>4</sup>

### III. Discussion

The Division determined that Ms. N. was not eligible for a 2008 PFD because before she applied for a 2008 PFD she was no longer an Alaska resident, was absent from Alaska for a disqualifying reason, had maintained her principal home and had accepted full-time, permanent employment in Maryland.<sup>5</sup> The Division argues this determination was correct. Ms. N. argues that she is eligible because she has maintained her Alaska residency and was on an allowable absence. Ms. N., as the person challenging the Division's action, has the burden of proving that the Division is in error.<sup>6</sup>

#### *PFD Eligibility*

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.

In addition to establishing Alaska residency and maintaining the intent to return to Alaska and remain indefinitely and not being on a statutorily disqualifying absence, an individual must meet the eligibility requirements established by the applicable regulations.<sup>7</sup> 15 AAC 23.143(d)(1)-(17) specify a variety of specific actions that render an Alaska resident ineligible for a dividend. In this case, the Division argues that that Ms. N. is ineligible under 15 AAC 23.143(d)(1) and (4), which disqualify for to maintaining one's principal home, or accepting full-time, permanent employment outside Alaska.

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<sup>3</sup> Exhibit 5, p. 4.

<sup>4</sup> Exhibit 7, p. 6.

<sup>5</sup> Exhibit 6, p. 1.

<sup>6</sup> 15 AAC 05.030(h).

<sup>7</sup> In a number of prior cases, the Alaska Supreme Court has upheld regulations restricting eligibility for a permanent fund dividend beyond the specific statutory requirements of AS 43.23.005(a) and AS 43.23.008. *See Church v. State, Department of Revenue*, 973 P.2d 1125 (Alaska 1999); *Brodigan v. Alaska Department of Revenue*, 900 P.2d 728 (Alaska 1995); *State, Department of Revenue, Permanent Fund Division v. Bradley*, 896 P.2d 237 (Alaska 1995); *State, Department of Revenue, Permanent Fund Division v. Cosio*, 858 P.2d 621 (Alaska 1993).

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 assume that the two concepts are interchangeable, when one looks at the PFD statute it is clear they are not, as the example of a resident traveling for 181 days illustrates. Subsection (d) identifies seventeen 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 disqualify 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.

*Alaska Residency*

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.

AS 01.10.055(c) provides that an Alaska resident severs residence in Alaska if the person, while absent from the state, performs acts or is absent under circumstances that are inconsistent with the intent to return to Alaska and remain indefinitely. The division contends that the Ms. N.’s actions are inconsistent with the intent to remain a resident of Alaska.

Leaving Alaska for an extended period of time is not always inconsistent with an intent to return to Alaska and remain indefinitely: it is common for Alaskans to leave on extended winter visits to warmer climates, and it is not at all unusual for an Alaskan to leave the state for an extended period to attend school as Ms. N. is doing. Similarly, accepting full-time employment is not always inconsistent with an intent to return to Alaska and remain indefinitely: an individual who is absent for an extended but determinate period of time has to earn a living, and a permanent job may be the only one available.

Under Alaska law in determining residency an individual's actions are considered in light of all of the circumstances.<sup>8</sup> Under Alaska Statute 43.23.015 the residency of an individual's spouse may not be the principal factor relied upon by the Division in determining the residency of the individual for the purposes of PFD eligibility.

In this case, the evidence shows that Ms. N. has retained the intent to return to Alaska and remain indefinitely at least through the date of her application for a 2008 PFD. The evidence in the file supports Ms. N.'s assertion that she intends to return to Alaska when her husband completes his current tour of duty and that she has not taken action inconsistent with the intent to remain a resident. Ms. N.'s decision to leave Alaska with her Alaskan husband while he is on an active duty military absence does not show that she is not an Alaska resident. The evidence shows that Ms. N. is an Alaska resident. The remaining issue is whether Ms. N. is ineligible because she herself was on a disqualifying absence or because she maintain her principal home and accepted full-time, permanent employment outside Alaska.

#### *Disqualifying Absence*

In order to qualify for a permanent fund dividend, the applicant must have been physically present in Alaska all through the qualifying year, or must only have been absent for one of the reasons listed in AS 43.23.008.<sup>9</sup> Under that list, an Alaskan may be absent for up to 180 days for any reason consistent with Alaska residency.<sup>10</sup> Under that list, an Alaskan also may be absent for any length of time during the qualifying year while the person is "serving on active duty as a member of the armed forces of the United States or accompanying, as that individual's spouse, minor dependent, or disabled dependent ... an individual who is (A) serving on active duty as a member of the armed forces of the United States; and (B) eligible for a current year dividend."<sup>11</sup>

Because the Ms. N. was absent not from Alaska for more than 180 days in 2007, the 180-day allowable absence for general reasons available to all residents apply to this case.

As someone who was absent as the spouse of someone serving on active duty as a member of the armed forces of the United States, who was an ineligible Alaska resident, Ms. N. could not be absent for more than 180 days in 2007 simply to accompany him and be eligible for a 2008 PFD. The law is clear that the exception to the rule requiring physical presence in Alaska is only available

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<sup>8</sup> See AS 43.23.015(a) ("The commissioner shall consider all relevant circumstances in determining the eligibility of an individual."); 15 AAC 23.143(a) (the division will "consider" an individual's actions).

<sup>9</sup> AS 43.23.005(a)(6).

<sup>10</sup> AS 43.23.008(a)(16)(A).

to those accompanying active-duty members of the armed forces who are eligible for a 2008 PFD. As an individual who was not eligible for a 2008 PFD because he missed the deadline for changing his state of legal residence on his employment records, Ms. N.'s husband does not fall within this category, but Ms. N. was not absent for more than 180 days in 2007.

Furthermore, Alaska Statute 43.23.008(a)(1) allows an indefinite absence for Alaskans who are receiving secondary or postsecondary education on a full-time basis. Alaska Statute 43.23.008(a)(17)(B) disqualifies individuals absent more than 120 days in addition to absences for the full-time educational reasons listed under Alaska Statute 43.23.008(a)(1)-(2), if absent more than 180 days cumulatively during the PFD qualifying year. Therefore, a college student absent more than 180 total days and more than 120 days with less than full-time student status during the qualifying year is not eligible for a PFD. The qualifying year for the 2008 PFD was 2007.

Ms. N. was not absent more than 180 days cumulatively during 2007. Ms. N. was not absent more than 120 days with less than full-time student status during 2007. Ms. N. had full-time student status during her short absence in 2007 and for at least the first part of 2008 and had not been in absent status more than 120 days with less than full-time student status in 2007 or even in 2008 when she filed her 2008 PFD application. Ms. N. was not on an absence that disqualified her from 2008 PFD eligibility under AS 43.23.008 before she filed her 2008 PFD application.<sup>12</sup>

#### *Principal Home*

15 AAC 23.143(d)(1) provides that an otherwise eligible applicant is disqualified if, at any time from the beginning of the qualifying year through the date the application is complete, the applicant has "maintained the individual's principal home in another state," except while absent for specified reasons, such as attending college or accompanying and eligible resident who is serving in the military.<sup>13</sup> Ms. N. was not claiming an allowable absence for accompanying an eligible resident who is serving in the military in 2007, but Ms. N. was a full-time student both in 2007 and 2008. Ms. N. is not therefore disqualified for the 2008 dividend even though she maintained her principal home in Maryland before the date of her application for a 2008 PFD.

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<sup>11</sup> AS 43.23.008(a)(3).

<sup>12</sup> Whether Ms. N. will be disqualified for an absence under AS 43.23.008 from PFD eligibility is not at issue in this case. A person cannot be eligible for a PFD without establishing Alaska residency and remaining in Alaska as an Alaska resident for at least six consecutive months before leaving on an extended absence. This requirement is found in Alaska Statute 43.23.008(b). Ms. N.'s husband may not be eligible for a 2009 PFD despite his Alaska residency due to this rule. To qualify for a 2009 PFD, Ms. N. would need to meet the requirements of an allowable absence under Alaska Statute 43.23.008 other than the allowable absence for accompanying an eligible spouse if this is the case.

<sup>13</sup> See 15 AAC 23.143(d)(1)(A), (B).

### *Full-Time Permanent Employment*

15 AAC 23.143(d)(4) provides that an otherwise eligible applicant is disqualified if at any time from the beginning of the qualifying year through the date the application is complete, the applicant has “accepted full-time, permanent employment in another state,” except while absent for specified reasons.<sup>14</sup> Again, attending college or accompanying and eligible resident who is serving in the military are included among these reasons.<sup>15</sup> Ms. N. was not accompanying and eligible resident who is serving in the military in 2007, but Ms. N. was a full-time student both in 2007 and 2008. Ms. N. is not therefore disqualified for the 2008 dividend even though she accepted full-time, permanent employment in Maryland before the date of her application for a 2008 PFD.

### *Primary Reason*

The central theme of the Division’s arguments against Ms. N.’s eligibility for a 2008 PFD is the Division’s view that the primary reason for her absence from Alaska was to accompany her ineligible husband rather than to go to school. Neither the statutory nor the regulatory PFD eligibility requirements explicitly require that the primary purpose of an absence from Alaska be for one of the reasons listed under Alaska Statute 43.23.008(a). A requirement that *secondary* education be the primary reason for an absence claimed under Alaska Statute 43.23.008(a)(1) is implied by the language of Alaska Regulation 15 AAC 23.163(d), but in its the context in this regulation, this implied requirement is consistent with the more general requirement that all allowable absences be consistent with Alaska residency. A child’s absence primarily for the purpose of living with a nonresident parent is generally inconsistent with continued Alaska residency. As noted above, Ms. N.’s absence is consistent with continued Alaska residency, and due the unusual circumstances of her situation, she is not disqualified despite her husband’s failure to meet the eligibility requirements.

### **IV. Conclusion**

If Ms. N.’s husband had been an eligible Alaska resident rather than merely an Alaska resident there would be no issue with Ms. N.’s eligibility for a 2008 PFD. Because Ms. N.’s husband is technically ineligible for a 2008 PFD despite his Alaska residency and his active duty service, Ms. N. would also be disqualified due to her having maintained her primary home and accepted employment outside Alaska, but for the fact that by enrolling as a full-time student. Ms.

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<sup>14</sup> See 15 AAC 23.143(d)(4)(A), (B).

<sup>15</sup> See 15 AAC 23.143(d)(1)(A), (B).

N. met the technical requirements for an allowable absence on her own, which allowed her to take these steps without them disqualifying her for a 2008 PFD.

**V. Order**

IT IS HEREBY ORDERED that the application of H. J. N. for a 2008 permanent fund dividend be GRANTED.

DATED this 13th day of October, 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 9th day of November, 2009.

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

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