

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

In the Matter of:)
)
D. E. B.,)
P. J.-B.)
and T. K. J.-A. (minor)) OAH No. 09-0437-PFD
) Agency No. 2008-060-6501
2008 Permanent Fund Dividend)

DECISION

I. Introduction

This is an appeal of the denial of the Permanent Fund Dividend (PFD) applications for D. B., his wife P. J.-B., and their granddaughter T. K. J.-A.. All three applied for the 2008 PFD, and all three applications were denied. The applications were again denied at the informal appeal level, and the B.s have requested a formal appeal. A telephonic hearing was held on November 5, 2009.

II. Facts

Mr. B. is an active duty member of the military who moved to Alaska in 1998. Mrs. J.-B. was born and raised in Fairbanks. The B.s left Alaska in 2001 when Mr. B. was transferred to Ft. Bragg in North Carolina.¹ All three were absent from Alaska for more than 180 days during 2007,² which is the qualifying year for the 2008 PFD.

Mr. B. was deployed to Iraq from October 28, 2003 through January 22, 2004. In April 2004 he was transferred to Korea. While in Korea, Mr. B. was deployed to Iraq where he remained until he returned to Ft. Carson, Colorado in August of 2005. While stationed in Colorado, Mr. B. had several mandatory training assignments. He was then re-deployed to Iraq from October, 2006 through January 2008.

Mr. B. was able to return to Alaska for 15 days from June 24, 2003 through July 9, 2003, and again for four days from May 6, 2005 through May 10, 2005.³ Mrs. J.-B. and T. J.-A. were

¹ During the appeal process, the B. submitted several copies of military orders and other evidence describing their absences and their return trips to Alaska. Exhibit 12 summarizes some of those documents and is used as the basis for the facts discussed here unless otherwise noted.

² Exhibit 1.

³ Exhibit 5, page 3.

able to return more often.⁴ At least as of March 30, 2008, Mr. B. has listed an assignment in Alaska as his third choice for when he is reassigned.⁵

In September of 2004, while stationed in Korea, Mr. B. was granted 15 days of R&R leave.⁶ In July of 2007, while deployed in Iraq, Mr. B. was granted 15 days of R&R leave.⁷

III. Discussion

To be eligible to receive a PFD, an applicant must be physically present during the entire year unless absent for one of the reasons allowed by law.⁸ The allowable absence applicable here is that of being on active duty as a member of the armed services, or being a spouse or minor dependent of an active duty military member.⁹ Continued eligibility under this allowable absence is broad, but not unlimited.

An individual who has been absent from the state for more than five years is presumed not to have the intent to return to Alaska to remain indefinitely.¹⁰ Someone who does not intend to return and remain in Alaska is, by definition, no longer an Alaska resident.¹¹ In addition, if the individual has not returned for at least 30 days during that five year period, there is an additional presumption that the individual cannot meet his burden of proving his or her intent to return to and remain in Alaska.¹² This is, in effect, a presumption within a presumption. It is very difficult – even for members of the military – to remain eligible to receive a PFD if they do not meet this 30 day requirement.

The failure to return for at least 30 days during the five year period can be rebutted by showing that unavoidable circumstances prevented the individual from returning.¹³ If unavoidable circumstances are shown, then a variety of other factors are considered to determine whether the individual does have the required intent to return to Alaska and remain indefinitely.¹⁴ If unavoidable circumstances are not shown, however, then the individual has not met the burden of proof and has not rebutted the presumption that a person who has not returned for at least 30 cumulative days is no longer eligible to receive a PFD.

⁴ Exhibit 4, page 29.

⁵ Exhibit 7, page 8.

⁶ Exhibit 5, page 9.

⁷ Exhibit 4, page 8.

⁸ Alaska Statute AS 43.23.005(a)(6).

⁹ AS 43.23.008(3).

¹⁰ Alaska Regulation 15 AAC 23.163(f).

¹¹ AS 01.10.055.

¹² 15 AAC 23.163(h)(2).

¹³ 15 AAC 23.163(h)(2).

¹⁴ 15 AAC 23.163(g).

The five year period for Mr. B. is from January 2003 through December 2007. During that time he was only able to return to Alaska for 19 days. During those 60 months, Mr. B. was in Korea or Iraq for about 35 months. Apparently, Korea is considered a combat assignment, as is Iraq. It can be assumed that, except when granted leave, these assignments would constitute unavoidable circumstances which would prevent his return. Mr. B. has not, however, shown unavoidable circumstances for all of the remaining 25 months of the five year period. In addition, he has not shown unavoidable circumstances for the two periods of leave he was granted while in Korea and Iraq. While he had some mandatory trainings, there were other time periods where Mr. B. may have been able to take leave and travel to Alaska. It is Mr. B.'s burden to establish that he could not have done this.¹⁵

Certainly it would have been expensive for Mr. B. to return to Alaska more often, especially if he was not able to purchase 14 day advance tickets. It would likely also have been inconvenient, and he may not have been able to schedule trips at times when his family could join him. Prior interpretations of the PFD regulations establish that "unavoidable" requires more than inconvenience and expense.¹⁶ Mr. B. has not shown that unavoidable circumstances prevented him from returning to Alaska for 11 more days during the five year period.

Mrs. J.-B. has returned to Alaska more often, but she has still been absent for more than 180 days during the qualifying year. The only allowable absence that potentially would allow her to remain eligible for a PFD is that of a spouse accompanying an active duty member of the armed services. This absence is only allowable, however, if the member of the armed services is independently eligible for a PFD.¹⁷ Because Mr. B. is not eligible to receive the 2008 PFD, Mrs. J.-B. is also not eligible.

This same analysis applies to T. J.-A.' eligibility. She also was absent for more than 180 days and does not qualify for any of the allowable absences.

IV. Conclusion

Mr. B. has not demonstrated that unavoidable circumstances kept him from returning to Alaska for at least 30 days during the five year period ending December 31, 2007. Accordingly, he is not eligible to receive the 2008 PFD. Because their eligibility depends on Mr. B.'s

¹⁵ 15 AAC 05.030(h) & 15 AAC 23.173(i).

¹⁶ See, *In the Matter of K.A.P.*, OAH No. 09-0274-PFD.

¹⁷ AS 43.23.008(3)(B).

eligibility, neither Mrs. J.-B. nor T. J.-A. are eligible to receive the 2008 PFD. The division's denials are affirmed.

DATED this 31st day of December, 2009.

By: _____
Kay L. Howard
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 29th day of January, 2010.

By: Signed _____
Signature
Kay L. Howard _____
Name
Administrative Law Judge _____
Title

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