

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

In the Matter of:)	
)	
S. R. B.)	OAH No. 09-0440-PFD
)	Agency No. 2008-032-3064
<u>2008 Permanent Fund Dividend</u>)	

DECISION

I. Introduction

S. R. B. timely applied for a 2008 permanent fund dividend (PFD). The Permanent Fund Dividend Division (“division”) determined he had not been a state resident for the entire qualifying year in 2007 and denied his application initially and at the informal appeal level. At Mr. B.’s request, a formal hearing was held on October 5, 2009; he is represented by counsel, Zach Manzella. The division’s denial is affirmed because Mr. B. has not submitted evidence sufficient to rebut the presumption of ineligibility that stems from his absence from Alaska 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.

Mr. B. is a pilot. He first came to Alaska in 1995, working in various seasonal jobs around the state until he moved to Anchorage in 1997 and began working for E. H. He received PFDs from 1999 through 2002.

In late 2001, Mr. B. was hired by F. I., a Virginia company, to fly daily trips to Amchitka for the U.S. Navy through the winter of 2001. As of February 2002 there was no more work available to Mr. B. in Alaska, so he chose to be transferred to Australia, where he worked in a training capacity with the military of that country. His initial contract overseas was for 3-6 months, but it was extended several times. Mr. B.’s only trips to the U.S. were for mandatory captain’s checkrides in Virginia. Mr. B.’s contract expired and he was laid off in November 2004.

In June or July 2005, Mr. B. began working with the U.S. State Department on a project assisting the Peruvian government with the purchase of aircraft and training of pilots. The program was terminated in the spring of 2006 and Mr. B. was laid off. He vacationed in

Australia for two to three months, traveled to Washington, D.C., and finally went to Minnesota, where his parent, sister and daughters live, for the 2006 Christmas holidays. Mr. B. returned to Alaska on January 12, 2007. He timely applied for the 2008 PFD, which was denied. This appeal followed.

III. Discussion

To qualify for a PFD, a person must be an Alaska resident throughout the qualifying year and at the date of application.¹ The qualifying year for the 2008 PFD is 2007. 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.² A person requesting a formal hearing has the burden of proving that the division's decision was in error.³

PFD regulation 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 not an Alaska resident anymore.⁴ It is rare that a PFD applicant who spends the majority of 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.

This presumption is rebuttable.⁵ However, 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"⁶ 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. Unavoidable circumstances have been found to exist where the ability to return to Alaska was beyond an applicant's control such as deployment overseas with no opportunity for leave.⁷ Here, the five-year period during which Mr. B. needed to make 30 days of visits to avoid the

¹ AS 43.23.005(a)(2), (3).

² AS 01.10.055(a).

³ 15 AAC 05.030(h).

⁴ 15 AAC 23.163(f).

⁵ 15 AAC 23.163(g).

⁶ 15 AAC 23.163(h)(2).

⁷ *In re V. V. et al.*, OAH No. 07-0104-PFD (2007).

presumption ran from February 2002 through January 12, 2007. During this period he failed to return to Alaska at anytime. In his request for an informal appeal, Mr. B. wrote:

During the two years of 2005 and 2006 I was involved with the U.S. State Department's efforts to protect America's interests abroad by providing military support and drug interdiction assistance. As a diplomatic agent for the U.S. Department of State, my orders placed me in several countries, assigned to giving F. support to the military and other federal agencies both foreign and domestic. During 2005 and 2006 my position did not permit an easy return to the United States, specifically Alaska due to my service in remote locations overseas and the clandestine nature of that service.^[8]

At the hearing, Mr. B. acknowledged that during the period of time he was laid off from November 2004 through July 2005, "nothing directly" prevented him from returning to Alaska. Mr. B.'s family is in Minnesota, so he went to see them for the 2004 holidays, then he started helping the State Department procure aircraft for the Peruvian program. Similarly, after he was laid off in 2006, Mr. B. vacationed for two to three months in Australia before joining his family in Minnesota for the holidays and then traveling to Alaska on January 12, 2007. He said that had he known he would have to be back in Alaska before January 1, 2007, he would have traveled to the state right after Christmas instead of waiting until after January 1st.

Mr. B.'s reasons for not visiting Alaska focused on his overseas deployments and the difficulty in being able to get away while he was working. Although Mr. B.'s situation made it impractical to return to Alaska, in 2005 and again toward the end of 2006 there were several months during which he was not working and could have visited the state. Thus, there were no "unavoidable circumstances" in Mr. B.'s case and the presumption in 15 AAC 23.163(f) that a person who is absent from the state for more than five consecutive years is not an Alaska resident any longer does apply.

The law contains a number of listed factors that the division can consider to determine whether the person has rebutted the presumption, but the most important of these are the frequency and duration of voluntary return trips to Alaska during the absence.⁹ The factors are reviewed as follows:

1. *Length of absence compared to time in Alaska before departing.* Mr. B. was in Alaska for seven years and absent for five, so the length of his absence did not exceed the time he spent in Alaska before leaving in connection with his F. I. job.

⁸ Exh. 5 at pg. 4.

2. *Frequency and duration of return trips to Alaska.* Mr. B. made no trips to Alaska during his absence.

3. *Whether intent to return is conditioned on future events beyond the individual's control, such as economics or finding a job in Alaska.* Mr. B. left Alaska in 2002 because his employment took him out of the country. His subsequent employment also kept him out of the country, but he also vacationed in Australia for two months following his latest layoff.

4. *Any ties the individual has established outside Alaska (homes, taxes, voter registration, etc.).* Mr. B. did not establish any significant ties outside Alaska during his absence.

5. *Priority the individual gave Alaska in employment assignment preference.* Before his employment with F. I. took him out of state in 2002, Mr. B. requested additional work in Alaska, but F. I. did not have any more work for him in the state.

6. *Whether the individual chose a career path that does not allow return to Alaska.* Mr. B.'s career choice as a pilot actually is conducive to working in Alaska.

7. *Ties to Alaska such as real property, voter registration, etc.* While absent, Mr. B. maintained his Alaska driver's license and voter registration and stored his personal effects with a friend in the state. He has never owned property in Alaska due to the itinerant nature of his employment.

Most of the above factors are neutral. However, most damaging to Mr. B.'s appeal is that he did not return to Alaska at any time during his five-year absence and his 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."¹⁰ Taking all of these factors into account Mr. B. has not rebutted the presumption created by an absence exceeding five years.

Mr. B. asserts that under AS 43.23.005(f)(1) he is entitled to a waiver of the requirement that a PFD applicant be physically present in the state "for at least 72 consecutive hours" during the two years immediately prior to the current dividend year.¹¹ Recognizing that there are times when circumstances may not permit members of the armed forces and their families to return for

⁹ *Id.*; 15 AAC 23.163(h).

¹⁰ 15 AAC 23.163(h)(1).

72 consecutive hours, the law permits the Commissioner of Revenue to waive the 72 hour requirement in a time of national military emergency.¹² On January 8, 2008, the Commissioner of Revenue exercised his discretion and signed the National Emergency Military Absence Policy for the 2008 PFD waiving the 72 hour requirement if the military member 1) requests a waiver and 2) provides a 2007 Leave and Earning Statement (LES) showing receipt of imminent danger or hostile fire pay.¹³ The waiver, if applicable applies only to 2006 and 2007.

During 2006 and 2007, Mr. B. was not in the military; he was a civilian contractor. Also he spent several months of 2006 vacationing and visiting family, not receiving imminent danger or hostile fire pay. The waiver does not apply to Mr. B.

IV. Conclusion

S. R. B. has not rebutted the presumption that an individual whose absence totals more than five years no longer has the intent to return to Alaska and remain indefinitely. Therefore upon his return to Alaska on January 12, 2007, he did not meet the definition of state resident and was required to reestablish his residency. Since an applicant must be a state resident at all times during 2007, the qualifying year for the 2008 PFD, Mr. B. is not entitled to a 2008 PFD. The division correctly denied Mr. B.'s application for a 2008 PFD.

DATED this 14th day of December, 2009.

By: Signed
Kay L. Howard
Administrative Law Judge

¹¹ See AS 43.23.005(a)(4).
¹² AS 43.23.005(f).
¹³ Exhibit 11 at 5.

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 11th 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.]