

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

IN THE MATTER OF)
M. J. B.)
) Case No. OAH 09-0470-PFD
2008 Permanent Fund Dividend)

DECISION & ORDER

I. Introduction

M. J. B. timely applied for a 2008 permanent fund dividend. The Permanent Fund Dividend Division first determined that Mr. B. was eligible and paid Mr. B. the 2008 PFD. Later, based on a fraud tip and Mr. B.'s failure to timely provide requested information, the Division denied Mr. B.'s 2008 PFD application and assessed him for the incorrect payment. The Division again denied Mr. B.'s 2008 PFD application and assessed him for the incorrect payment at the informal appeal level. Mr. B. requested a formal hearing. Administrative Law Judge Mark T. Handley heard the appeal on October 12, 2009. Mr. B. participated by telephone. Peter F. Scott represented the Division by telephone.

The administrative law judge concludes that the Division correctly denied Mr. B.'s 2008 PFD application. Mr. B. does not qualify for a 2008 dividend because he had accepted full-time, permanent employment in California in 2007.

II. Facts

Mr. B. was very contrite and helpful in explaining his reporting issues, absences and his history during the hearing.¹ Mr. B. was raised in Alaska.² Mr. B. works in California but returns to Alaska almost weekly to stay with his girlfriend in Anchorage on his days off.³

Mr. B. was a baggage handler with Alaska Airlines based in Anchorage in 2007.⁴ Mr. B. was offered a promotion to an indoor job in June of 2007.⁵ This new position with Alaska Airlines required that he be based at LAX in California.⁶ When he started in this new position in California, Mr. B. first slept on a couch in a friend's pool room between shifts. He later started sleeping in an RV in an LAX parking lot between shifts.⁷

¹ Recording of Hearing.

² Recording of Hearing.

³ Recording of Hearing.

⁴ Recording of Hearing.

⁵ Recording of Hearing.

⁶ Recording of Hearing.

⁷ Recording of Hearing.

Mr. B.'s shifts were irregular. Sometimes he worked more, and sometimes he worked less, than 40 hours per week.⁸ For his days off, Mr. B. would catch a free trip back to Anchorage to stay with his parents or his girlfriend.⁹ Mr. B. filed a non-resident 2007 California tax return.¹⁰ In 2009, Mr. B. has decided to try to transfer back to Anchorage as a baggage handler again. He is confident that Alaska Airlines will approve his transfer request in April of 2010.¹¹

Mr. B. was absent 176 days in 2007.¹² On his 2008 PFD application, however, Mr. B. indicated that he was absent less than 90 days in 2007.¹³ Mr. B. explained this error as an inexcusable mistake that was based on a very rough guess. Mr. B. stated that when he answered that question on the application, he thought he probably was absent less than 90 days in 2007 because he had not started working in LAX until June of 2007 and he had returned to Alaska almost every week.¹⁴ Mr. B. also explained that he thought that he might get credit for part-days spent in Alaska.¹⁵

Based on the evidence in the record, I find that it is more likely than not that Mr. B. made a very careless mistake on his application, but did not provide intentionally deceptive information. Based on the evidence in the record, I also find that it is more likely than not that Mr. B. accepted full-time, permanent employment in California in 2007.¹⁶

III. Discussion

In a PFD hearing, the person who filed the appeal, in this case Mr. B., has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁷

Intentionally Deceptive Information

The eligibility requirements for a 2008 PFD disqualify those who provide intentionally deceptive information on their PFD applications:

⁸ Recording of Hearing.

⁹ Recording of Hearing.

¹⁰ Exhibit 14.

¹¹ Recording of Hearing.

¹² Recording of Hearing & Exhibit 13.

¹³ Recording of Hearing & Exhibit 1.

¹⁴ Recording of Hearing.

¹⁵ Recording of Hearing.

¹⁶ Recording of Hearing.

¹⁷ Alaska Regulation 15 AAC 05.030(h).

Alaska Regulation 15 AAC 23.103. Application generally

* * *

(j) The department will deny an application if the department determines that an individual has intentionally provided deceptive information such as failing to disclose a reportable absence to the department....

Mr. B. admitted that he now realizes that his claim not to have been absent from Alaska for more than 90 days in 2007 was incorrect. Mr. B. does not dispute the Division's calculations, based on the records that he provided, that he was actually absent from Alaska for 176 days in 2007. Mr. B.'s testimony was that his claim not to have been absent from Alaska for more than 90 days in 2007 was made as the result of a very rough guess, but that he did not intend to provide deceptive information. Mr. B.'s testimony was credible. Mr. B.'s situation was unusual. Mr. B. was probably under a lot of pressure to spend as much time as possible in Alaska since he started working in California because his girlfriend lives in Alaska and because his mother, who lived in Anchorage, was suffering from a terminal illness. As a result, it may have seemed to Mr. B. in retrospect that he had spent more time in Alaska in 2007 than he actually did. Mr. B. did not transfer until the qualifying year was almost half over. From Mr. B.'s perspective, he continued to live in Alaska in 2007, sleeping between shifts on a couch or in an RV with no hook-up, and returning to Alaska almost every week for his days off. Mr. B.'s confusion about his PFD eligibility and the number of days he was absent is therefore plausible.

Given the magnitude of the number of days that he was off in his guess, and the financial incentive for attempting to qualify, there is a strong possibility that Mr. B. did provide intentionally deceptive information on his 2008 PFD application. Mr. B. had reason to suspect that his continued Alaska residency for PFD purposes was questionable, and he may have answered untruthfully simply because he wished to apply on-line and to avoid answering more questions about his residency. Mr. B.'s testimony, however, was credible. Mr. B. was not evasive. He seemed genuinely contrite about his carelessness. By a bare preponderance of the evidence, Mr. B. showed that he did not intend to deceive the Division.

Full-Time Permanent Employment

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, in order to qualify for a

PFD an individual must meet the eligibility requirements established by the applicable regulations.¹⁸ 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 Mr. B. is ineligible under 15 AAC 23.143(d)(4), which disqualifies for accepting full-time, permanent employment outside Alaska.

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.

Mr. B. accepted employment in 2007, which, despite the irregularity of his shifts, would require that he would be spending most of his time outside Alaska for the foreseeable future. This was full-time, permanent employment outside Alaska.

IV. Conclusion

Because he accepted full-time, permanent employment outside Alaska in 2007, Mr. B. was not eligible for a 2008 PFD. The Division correctly denied and assessed the application of M. J. B. for a 2008 PFD.

DATED this 16th day of November, 2009.

By: Signed
Mark T. Handley
Administrative Law Judge

¹⁸ 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).

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 16th day of December, 2009.

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

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