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

IN THE MATTER OF	)	
	)	
S. O.	)	
	)	Case No. OAH 09-0497-PFD
2008 Permanent Fund Dividend	)	

DECISION

I. Introduction

S. O. timely applied for 2000 and 2008 permanent fund dividends. The Permanent Fund Dividend Division ("the division") determined that Mr. O. was not eligible, and it denied both applications. Mr. O. filed a request for appeal for both applications on April 10, 2009. The division denied the informal conference request for the 2000 application on the grounds that it was untimely, having been delayed for more than seven years. The division denied the 2008 informal appeal request on the grounds that Mr. O. was collaterally estopped from challenging the decision that his residency had been terminated.

Mr. O.'s appeal of the denial of his 2000 dividend is dismissed because Mr. O. did not file a request for appeal within sixty days of the decision to deny the application.

Mr. O. is not collaterally estopped from litigating the issue of whether he ever severed his Alaska residency. That issue has not previously been litigated or discussed at any level of appeal.

Despite a lengthy absence, it is more likely than not that Mr. O. maintained the intent to return to Alaska to remain indefinitely from the time he left until he returned to make his home in June, 2007. Mr. O. is eligible for a 2008 dividend.

II. Facts

Mr. O. came to Alaska in October of 1987 when he was stationed at Elmendorf Air Force Base as a member of the Air Force. Mr. O. lived in Alaska until 1993, when the Air Force transferred him to Arizona. At some point Mr. O. transferred to Okinawa with the hopes that this overseas service would entitle him to return to Alaska. Unfortunately, the positions that Mr. O. would have been assigned to in Alaska were contracted out to private sector providers, and Mr. O. did not get the transfer he had hoped for. After he retired and was discharged, Mr. O. immediately returned to Alaska on June 23, 2007. In August of 2007 he bought a house in Alaska and he has lived in the state ever since.

While he was absent, Mr. O. maintained his Alaska driver's license, vehicle registrations, and voter registration. He maintained Alaska as his state of legal residence in his military employment

records. Mr. O.'s adoptive parents reside in Anchorage, and he kept in touch with friends in Alaska while he was absent. In 2004, Mr. O. bought a house in Arizona to live in while he was stationed there, and as an investment. Mr. O. still owns this house, which is currently rented out.

During his absence, Mr. O. returned to Alaska to visit periodically: in 1994 for 15 days, in 1996 for one day, in 1998 for ten days, in 2000 for 5 days, in 2004 for four days, and in 2005 for five days.[1]

After leaving Alaska in 1993, Mr. O. continued to apply for dividends and his applications were granted until 2000, when the division denied Mr. O.'s application. Because Mr. O. had been absent for more than five years by 2000, the division presumed him to no longer be an Alaska resident under 15 AAC 23.163(h). Mr. O. was living in Okinawa at this time, and because of the distance and difficulty of communicating, Mr. O. did not appeal the decision. He applied again in 2001, but did not respond when the division requested additional information, and the division ultimately denied that application as well. Mr. O. did not apply again until 2009, by which time he had moved back to Alaska. When the division denied Mr. O.'s application for a 2008 dividend based on its decision on the 2000 application, Mr. O. requested an appeal for the first time on both applications.

III. Discussion

a. Mr. O.'s appeal of his 2000 PFD application is untimely.

A person wishing to appeal the denial of a permanent fund dividend application must request an appeal with sixty days of the day the division denied the application.[2] This deadline may be waived if strict adherence to the deadline would work an injustice.[3]

Mr. O. testified that he did not appeal the division's decision in 2000 because he was overseas in Okinawa at the time, was not familiar with the appeal process, and thought that in order to demonstrate his intent to return he would need to return to Alaska and take some step, such as buying land, that he was not in a position to do at the time. Mr. O. also testified that the military mail service was not entirely reliable, and he was not consistently receiving notices from the division.

The circumstances Mr. O. recites would be adequate to excuse a shorter period of delay of several weeks or months. But after seven years, it is fair for the division to consider the application abandoned. It appears that the principal concern in this case is the issue of Mr. O.'s residency, and

[1] Exhibit 5, page 2.
[2] 15 AAC 05.010(b).
[3] 15 AAC 05.030(k).

to what extent the division's decision in 2000 might affect Mr. O.'s 2008 application. Those issues may be addressed in Mr. O.'s timely appeal of the denial of his 2008 application, but strict adherence to the deadlines applying to the 2000 application will not work an injustice in this case.

b. Mr. O. is not collaterally estopped from litigating the issue of his Alaska residency.

The division's principal argument in this case is that Mr. O. is barred by the doctrine of collateral estoppel from arguing that he has maintained his Alaska residency during his absence. Before determining whether collateral estoppels applies to this case, it is helpful to understand the appeal process defined by the regulations of the Department of Revenue.

Appealing a decision made by a division of the Department of Revenue is a three-step process governed by 15 AAC 05.010-030. In the first step, under 15 AAC 05.010, a person who wishes to appeal the denial of a PFD must first file a "request for appeal" with the division within 60 days of the time the division denies the application. The request for appeal must state the grounds for objection, a brief summary of the facts at issue, and the legal authority relied on.

The second step, before the formal appeal process begins, is an informal conference under 15 AAC 05.020. In the informal conference, the division designates one person as an "appeals officer." The appeals officer will consider any additional information and arguments the applicant provides, either in a meeting, by correspondence, or by a phone call. The appeals officer then issues a written decision that "must identify the issues in controversy for purposes of further appeal."[4] The decision is not required to contain findings of fact or conclusions of law.

The decision of the appeals officer is not a final administrative decision that may be appealed to the courts. The appeals officer is not prohibited from having ex parte contact with the person who issued the division's first decision; the appeals officer could , theoretically, be the very same person. The appeals officer has no authority to administer oaths, issue subpoenas, or order discovery. There are no rules of procedure governing the informal conference; the applicant has no right to file motions, testify in person, or even to question witnesses. With the appeal officer lacking authority to administer oaths, the applicant may not provide sworn testimony. As its name suggests, the informal conference is nothing more than an opportunity for the division to take a second more informed look at its decision before the department conducts a formal hearing.

The third step of the appeal process is the formal hearing, governed by 15 AAC 05.030. A request for a formal hearing must be filed within thirty days of the informal conference decision.

[4] 15 AAC 05.020(b).

Because Mr. O.'s 2000 and 2001 applications predate the establishment of the Office of Administrative Hearings, the procedural regulations of the OAH did not apply to those applications. The formal hearing takes place at the department level by a hearing officer appointed by the Commissioner of Revenue. The hearing officer may not communicate with either party, even indirectly, unless notice and opportunity to participate is given to all parties. The hearing officer has specific authority to administer oaths, issue subpoenas, order discovery, issue protective orders, receive evidence, hear motions, and exercise other powers necessary for the orderly conduct of the hearing. The formal hearing is subject to detailed rules of procedure, with specific time limits for disqualification of the hearing officer, filing of motions, and requests for continuance and change of venue. The hearing officer is required to record the hearing, either electronically or by reporter. Formal hearings are not subject to technical rules of evidence, but evidence at a formal hearing is subject to standards for relevance, repetitiousness, hearsay, and unsworn testimony. Parties have the right at a formal hearing to call and examine witnesses, introduce and object to exhibits, cross-examine opposing witnesses, impeach witnesses, and offer rebuttal evidence. The regulation establishes the burden of proof. Upon adoption by the commissioner or a designee, the hearing officer's decision is a final administrative decision that may be appealed directly to the superior court.

Relying heavily on a previous decision of an administrative law judge acting as a hearing officer in a formal hearing, the division argues that Mr. O. is collaterally estopped from challenging the division's 2000 decision that he was no longer an Alaska resident. According to the Supreme Court,

> Collateral estoppel, or issue preclusion, bars the relitigation of an issue when (1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action; (2) the issue precluded from relitigation is identical to the issue decided in the first action; (3) the issue was resolved by a final judgment on the merits; and (4) the determination of the issue was essential to the final judgment. Issues must therefore actually be litigated before they can be precluded by collateral estoppel.[5]

The Supreme Court also determined in *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n, Inc.* that collateral estoppel "may be applied to the decisions of administrative agencies if, after case-specific review, a court finds that the administrative decision resulted from a procedure that seems an adequate substitute for judicial procedure and that it would be fair to accord preclusive effect to the administrative decision."[6] In that case, the court found that a multi-week hearing before a three-

[5] *Alaska Contracting & Consulting, Inc. v. Alaska Dept. of Labor*, 8 P.3d 340, 344-345 (Alaska 2000).
[6] *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n, Inc.*, 152 P.3d 460, 468 (Alaska,2007).

commissioner panel with extensive discovery, direct and cross examination, and a lengthy decision written by the panel was an adequate substitute for judicial procedure.

In the previous case relied on by the division, *In the Matter of I.E. and P.L.H.*, the administrative law judge found that an informal conference held by the division under 15 AAC 05.020 was "an adequate substitute for judicial procedure" because "the informal appeal afforded by the PFD division gave the H.s an opportunity to present their arguments and evidence by correspondence in a proceeding commensurate with the significance of the dispute."[7] Noting that the informal conference decision was three pages long, the administrative law judge reasoned that he was collaterally estopped from considering any issue that had been decided by the division in the informal conference, even though the "conference" might have consisted of nothing more than a single letter in response to a notice. The administrative law judge also noted that the applicants had the option of requesting a formal hearing and did not exercise it.

Having studied this decision the division has apparently concluded that any time it makes an executive decision and the applicant does not appeal that decision, the applicant is forever precluded from litigating the issues behind the division's decision. In this case, Mr. O. applied for a 2000 dividend and the division denied the application. Mr. O. did not appeal the decision, even to the informal conference level, because the Air Force was keeping him busy in Okinawa and he did not have time to argue with the division about whether he was still an Alaska resident. Now that he is back in Alaska and retired, Mr. O. wishes to be heard on the matter, at least as it pertains to his recent and timely application for a 2008 dividend.

It is not necessary to reexamine whether the decision in *In the Matter of I.E. and P.L.H.* was a correct application of the doctrine of collateral estoppel, because Mr. O.'s case is distinguishable. In the *I.E. and P.L.H.* case, the applicants filed a request for appeal, paid their appeal fee, and at least took their case as far as an informal conference. In that case there was at least at least some kind of administrative review of one initial determination, and an explanatory decision was written. But Mr. O. never even filed a request for appeal of the division's decision on his 2000 application. There were no procedures in the nature of an appeal, and there is nothing to point to that could be considered "an adequate substitute for judicial procedure."

By the division's reasoning in this case, every denial letter it sends out is the functional equivalent of a judgment issued by a court after a trial. The division no doubt gives careful

[7] *In the Matter of I.E. and P.L.H.*, OAH No. 06-0567-PFD (Office of Administrative Hearings, December 28, 2006); affirmed, *Ian & Peggy Harrod v. State of Alaska, Department of Revenue*, 4FA-07-1224 CI (Fairbanks Superior Court,

consideration to applications before it denies them, makes efforts to listen to people's arguments, and looks at the documents applicants provide before it makes a decision to deny an application for a dividend. But no matter how thoughtful and conscientious the division may have been, a decision at this level is not an adequate substitute for judicial proceedings. As the Supreme Court noted in *Alaska Contracting & Consulting, Inc. v. Alaska Department of Labor*,

> Issues must therefore actually be litigated before they can be precluded by collateral estoppel. This proposition dooms Alaska Contracting's arguments. First, the record does not establish that the division's 1990 non-liability determination was a final judgment resulting from an adjudicatory proceeding or from an adequate substitute procedure. Instead, it was the result of an executive decision by a division employee.[8]

A decision to deny a PFD application is also an executive decision of a division employee. Unlike in an adjudicatory forum, at this level there has been no decision made by an impartial third party weighing competing arguments. There has been no blindfolded holding up of the scales of justice.

As the administrative law judge pointed out in the *I.E. and P.L.H* case, the doctrine of collateral estoppel is "designed to prevent people from wasting resources by litigating issues over and over." Until now, Mr. O. has not burdened anyone or consumed any resources by litigating the issue of whether he has remained an Alaska resident during his absence from the state. The matter has never been looked into on appeal, even at the informal conference level. Mr. O. is entitled to at least one chance to present a case and be heard on the issue in some manner that is an adequate substitute for judicial procedure. This case must proceed to a decision on the issue.[9]

c. <u>Mr. O. remained an Alaska resident at all times during his absence from the state.</u>

A person who has been allowably absent for more than five years is, by law, presumably not an Alaska resident anymore.[10] If an applicant attempts to overcome this presumption, the division may rely on the following factors when making a decision[11]:

> (1) the length of the individual's absence compared to the time the individual spent in Alaska before departing on the absence;

March 13, 2009); appeal pending, *Ian & Peggy Harrod v. State of Alaska, Department of Revenue,* Alaska Supreme Court case number S13586.

[8] *Alaska Contracting & Consulting, Inc. v. Alaska Department of Labor,* 8 P.3d 340, 345 (Alaska 2000).

[9] See also *In the Matter of D.C., individually and ex rel. W. and W. G., and J.O.,* case no. 07-0653-PFD (OAH January 24, 2008): "The 2005 decision denying the dividend is not a conclusive determination that [Ms. C, Mr. O], and the children severed their residency in 2004. The denial of the application was not contested in a formal appeal, and thus the decision denying the dividend did not resolve any facts: it is a unilateral decision by the division, not an adjudication entitled to preclusive effect in subsequent litigation."

[10] 15 AAC 23.163(f).

[11] 15 AAC 23.163(g).

> (2) the frequency and duration of return trips to Alaska during the absence; the fact that the individual has returned to Alaska in order to meet the physical presence requirement of AS 43.23.005 (a)(4) is not sufficient in itself to rebut the presumption of ineligibility;
>
> (3) whether the individual's intent to return or remain is conditioned upon future events beyond the individual's control, such as economics or finding a job in Alaska;
>
> (4) any ties the individual has established outside Alaska, such as maintenance of homes, payment of resident taxes, vehicle registrations, voter registration, driver's licenses, or receipt of benefits under a claim of residency in another state;
>
> (5) the priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel;
>
> (6) whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska; and
>
> (7) any ties the individual has maintained in Alaska, such as ownership of real and personal property, voter registration, professional and business licenses, and any other factors demonstrating the individual's intent.

When considering these factors, the division must "give greater weight to the claim of an individual 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."[12] In considering what constitutes "frequent" return trips, thirty days in five years serves as a kind of guideline. Unless unavoidable circumstances have prevented return trips, the division must "generally consider that an individual who has not been physically present in Alaska for at least 30 cumulative days during the past five years has not rebutted the presumption" that he is no longer an Alaska resident.[13] The final rule governing this case is that a person requesting a formal hearing has the burden of proving that the division's decision was in error.[14]

In a case nearly identical to this one, *In the Matter of M. & A. R.*, the administrative law judge concluded:

> The division has correctly analyzed the law in this case and applied the above factors, giving particular weight to the fact that the R.s had not been back to Alaska for more than thirty days in the five years prior to their applications. Under these circumstances, the division's decision was consistent with the regulatory directive that it "generally consider" someone in the R.s' situation to no longer be an Alaska resident. However, the division has overlooked a significant and in this case determinative fact.

[12] 15 AAC 23.163(h)(1).
[13] 15 AAC 23.163(h)(2).
[14] 15 AAC 05.030(h).

> The division determined that, during their absence, the R.s lacked the intent to return to Alaska to make their home. In making this determination, the division overlooked one key fact: that the R.s did actually move back to Alaska to remain indefinitely and make their home. Although they did not return to Alaska for thirty days in the five-year period, there is nothing that they did while absent that is inconsistent with their ultimate return. There is no evidence, or any reason to believe, that while they were absent the R.s may have wavered or vacillated about whether they would return to Alaska to make their home.
>
> The regulation creating the measure of thirty days in five years provides a kind of yardstick for measuring the likelihood that a person still intends to return to Alaska. It is to be given great weight, but it is not an absolute rule; the division will *generally* follow it. It is a rare case when an applicant will be able to present such overwhelming evidence of intent to return to Alaska that the general rule should not be followed. The rule helpfully provides a concrete solution to the problem of actually measuring something as ethereal as a person's probable subjective intent.
>
> In this case, reliance on the thirty-day measure produces a result that is somewhat silly. The measure indicates that the R.s do not intend to return to Alaska to make their home. It is plain to see, however, that the R.s have in fact already returned to Alaska to remain indefinitely and make their home, making conjecture about the likelihood of such a return an unproductive exercise. The rule incorrectly projects the unlikelihood of an occurrence that has already occurred. The result is akin to using the best available scientific methods to predict rain for yesterday, when everybody remembers a clear sunny day.
>
> The general rule should not be applied to produce a result that is patently incorrect. This case is one of the few instances in which one of the "other factors demonstrating the individual's intent" to be considered under 15 AAC 23.163(g)(7) will outweigh all other factors, including the frequency and duration of the applicant's voluntary return trips to Alaska.[15]

Just as in the M. & A. R. case, Mr. O. has not returned with the frequency and duration necessary to overcome the general presumption that he would not be returning to Alaska to make his home after retiring from the military. As in that case, Mr. O. did in fact return, making speculation about whether he will return in the future a pointless exercise.

It is possible that during his lengthy absence Mr. O. did not continuously maintain the intent to return, but only decided to come back upon his retirement. But as in M. & A. R., there is no evidence suggesting that. Mr. O. did maintain paper ties to Alaska, a bit of evidence that is often of little value but indicative in this case that Mr. O. always planned to come back.

Above all else, Mr. O. was a particularly credible witness. The tone of his testimony carried an air of sincerity, and his statements showed that Mr. O. was aware of and took to heart that fact that he was speaking under oath. A preponderance of all the evidence shows it is more likely than not that Mr. O. maintained the intent to return to Alaska to remain indefinitely and to make his home at all times during his absence. The presumption of nonresidence has been rebutted.

IV. Conclusion

Mr. O.'s appeal of the denial of his application for a 2000 permanent fund dividend is not timely. The appeal of the 2000 denial is dismissed.

Mr. O. is not collaterally estopped from challenging the division's decision that he is not an Alaska resident. Because he remained an Alaska resident at all times during his absence, Mr. O. is eligible for a 2008 permanent fund dividend.

DATED this 4th day of May, 2010.

By: *Signed*
DALE WHITNEY
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 20th day of May, 2010.

By: *Signed*
Signature
Terry L. Thurbon
Name
Chief Admin. Law Judge
Title

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

[15] *In the Matter of M. & A. R.,* Case No. 06-0228-PFD (Office of Administrative Hearings, September 2006).