

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

IN THE MATTER OF)
)
 M. & B. C.)
) Case No. OAH 09-0618-PFD
)
2009 Permanent Fund Dividend)

DECISION

I. Introduction

M. and B. C. timely applied for 2009 permanent fund dividends. The Permanent Fund Dividend Division (“the division”) determined that the C.s were not eligible, and it denied the applications initially and at the informal appeal level. At the C.s’ request, a formal hearing was held on December 22, 2009. Mr. and Ms. C. appeared by telephone. PFD Specialist Peter Scott represented the division by telephone.

Because they moved from Alaska and claimed moving expenses on their 2008 federal tax returns, the C.s are not eligible for 2009 dividends.

II. Facts

The C.s are long-time Alaskans who have been receiving permanent fund dividends since 1982. Mr. C. has lived in Alaska since 1979 and Ms. C. since 1980. The C.s own two houses in Juneau, plus a small apartment building downtown, and they have family members living in Juneau. Over the years, the C.s have been active in Alaska’s public affairs.

In the middle of 2008 Mr. C. was approached about a possible appointment by a member of Legislator X’s staff. After a process of phone calls and meetings, Mr. C. was informally offered an appointment as [position] of the [committee]. It was understood that this appointment was contingent on Legislator X being selected as the ranking [party member] on the committee, a selection that was considered highly probable based on [Legislative body] tradition, but not an absolute certainty.

The C.s were confident enough that Mr. C. would be appointed that they began the process of moving to No Name City late in 2008. In November of 2008 they shipped one of their cars to Seattle and then drove it to No Name City, where Mr. C. had meetings related to his new job. The C.s flew back to Alaska, leaving the car behind in storage, and continued to pack up their belongings. Movers picked up their belongings for shipment near the end of December, although the cargo did not actually leave Alaska until January of 2009. The C.s left the state on December

31, 2008. There was no particular significance to the fact that they left on the last day of the year, other than the fact that the day before New Year's Day is an easy day to fly. The C.s submitted their applications for 2009 dividends electronically on January 13, 2009, disclosing that they were out of state and that their physical address was in No Name City, Virginia.

Legislator X was selected as ranking member of the committee in January, 2009, and within a few days her office issued a press release announcing Mr. C.'s appointment on January 27, 2009. In the summer of 2009, the C.s bought a home in Virginia from Mr. C.'s elderly aunt and uncle. The sale officially closed on September 8, 2009. The aunt and uncle continue to live in the home with the C.s, thereby delaying the necessity of having to move to a nursing home or assisted living type of facility.

Mr. C. serves at the pleasure of Legislator X, and his position is contingent on her reelection. The C.s would like to sell one of their homes in Juneau, but they are keeping one home for their eventual return to the state, in spite of their current tenant's desire to buy the home. The C.s anticipate that the housing market in the No Name City, area will improve over time, and that the purchase of their home in Virginia will prove to be a sound investment. At the same time, Mr. C. agrees that his position is properly regarded as permanent full-time employment as of January 20, 2009. Although he explored the possibility that his job might be regarded as time spent "serving on the staff of a member from this state of the United States Congress" for purposes of the allowable absence provisions of AS 43.23.008, Mr. C. also now agrees that his position as a committee staff member is not a functional equivalent of serving on the senator's staff for purposes of allowable absences. Because his absence would not be allowable, Mr. C. does not plan to apply for a 2010 dividend.

The C.s claimed a deduction for moving expenses on their 2008 federal tax return for the moving expenses they incurred that year. The greater part of their moving expenses were incurred in 2009, and the C.s plan to claim another deduction for those expenses as well. The division discussed with the C.s the possibility of amending their tax return to remove the claim for moving expenses in 2008, but the C.s declined to do so.

The C.s remain registered to vote in Alaska. They continue to maintain Alaska driver's licenses, and their vehicles are still registered in Alaska. Mr. C.'s parents, daughter, son-in-law, and granddaughter all continue to live in Juneau.

III. Discussion

According to 15 AAC 23.143(d),

An individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual has...(10) moved from Alaska,

(A) for a reason other than one listed

(i) in AS 43.23.008 (a)(1) - (3), (9) - (11), or (16); or

(ii) in AS 43.23.008 (a)(13), if the eligible resident whom the individual accompanies is absent for a reason listed in (i) of this subparagraph; and

(B) claiming moving expenses as a deduction on the individual's federal income tax return, unless the individual

(i) files an amended federal income tax return deleting the claimed moving expenses as a deduction; and

(ii) provides proof from the Internal Revenue Service that the individual filed an amended return;

There is no dispute that, before the date of their application on January 13, 2009, the C.s moved from Alaska for a reason other than one listed in subparagraph (A) above, and that they claimed moving expenses on their federal tax return and that they have not amended their return.

The C.s argue that a claim of moving expenses on a tax return is a mere indicator of nonresidency, not an absolute bar to eligibility. In their appeal, the C.s wrote,

We moved over the transition between 2008 and 2009. We claimed some moving expenses in 2008 and will claim the bulk of our moving expenses in 2009.

We have fully reviewed our moving expenses. On our 2008 tax return, we deducted \$7,993 as moving expenses. A copy of Form 3903 from our 2008 federal income tax return is enclosed. This deduction was for a deposit to the moving company, payment to a car transporter company, and the expenses of driving another car across the country in November, leaving it in Washington, and flying home to Juneau. These expenses were properly claimed on our 2008 federal income tax return.

On December 30, 2008, we packed household goods to be shipped to Virginia. On January 7, 2009, before the goods left Juneau, we paid \$6,480.37 to World Wide Movers. On January 24, 2009, after our goods were delivered, we paid an additional \$6,138.71 to the movers. The bill from the movers and a copy of our Visa showing our payments is enclosed. On our 2009 tax return, we will properly deduct approximately \$14,000 of moving expenses, including these payments to the moving company, airline tickets, and other miscellaneous moving expenses.

15 AAC 23.143, Establishing and maintaining Alaska residency, lists deduction of moving expenses as an item the department shall consider in evaluating intent. For purposes of Permanent Fund regulations, where the total expenses of a move stretch over two years, we believe a proper application of 15 AAC 23.143(4)(B) would be to apply it to the year household goods were actually moved and the bulk of moving expenses were incurred.

The reference to “15 AAC 23.143(4)(B)” is unclear. The applicable regulation, 15 AAC 23.143, consists of ten paragraphs, (a) through (j). While each paragraph is generally related to “establishing and maintaining Alaska residency,” the paragraphs are properly read standing alone. The C.s appear to have confused portions of paragraph (a) and paragraph and (d). Paragraph (a) reads in part,

In evaluating whether an individual claiming Alaska residency has demonstrated an intent to remain indefinitely in Alaska, the department will consider whether or not an individual has:

- (1) taken steps to establish Alaska residency and sever residency in a previous state or country;
- (2) ties to another state or country that indicate continued residency in the other state or country; and
- (3) taken other action during the qualifying year, through the date of application, that is inconsistent with an intent to remain in Alaska indefinitely.

Paragraphs (b) and (c) contain other rules regarding establishment of residency. Paragraph (d) then states that “an individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual has... (10) moved from Alaska... claiming moving expenses as a deduction on the individual's federal income tax return.”

While not specifically mentioned, a moving expense deduction might be one of the things the department could consider under paragraph (a). But the language of paragraph (d) is absolute. A person who moves from the state any time from the beginning of the qualifying year and the date of application and claims moving expenses in a federal tax return for that move is not eligible for a dividend that dividend year. In this case, the beginning of the qualifying year was January 1, 2008, and the date of application was January 13, 2009. Thus, if the C.s moved from Alaska before January 13, 2009, and claimed even a dollar as a deduction for that move, they will not qualify for 2009 dividends.

The C.s argue that they did not move in 2008, in spite of the fact that, at midnight on December 31, 2008 they were out of Alaska, their belongings were packed and waiting on a pier in Juneau under a shipping contract, both of their cars were out of the state, and they had vacated their house. But the preponderance of the evidence shows that by at least January 13, 2009, the C.s had moved from Alaska. If they claim a deduction for any of the costs of this move, either on their 2008 or 2009 tax returns, the C.s will not be eligible. The C.s have claimed a deduction in their 2008 return and testified that they intend to claim an even larger deduction for 2009.

The C.s point out that they were present in Alaska for almost all of 2008. Regarding moving expenses claimed for 2008, Mr. C. testified that

The law itself says the department shall consider that. Generally, when I see “consider” in a law it’s not “shall,” it’s an optional thing. I realize that the regulations of the department seem to be somewhat more strict but the law itself says “consider.” And we strongly feel that though there are some smaller portion of moving expenses that were properly done in 2008, we didn’t move in 2008. And it is appropriate for the department to consider that the move itself and the bulk of the, the large bulk of deductions will be done in 2009.

While actions in 2008 are material to eligibility for 2009 dividends, actions taken in 2009 before the date of application must also be considered. The basic eligibility statute requires Alaska residency both during the qualifying year and also on the date of application.¹ A different paragraph of 15 AAC 23.143 states that “(h) An individual who on the date of application knows the individual will be moving from Alaska at a specific time to a specific destination for a reason other than one allowed by AS 43.23.008 (a) does not have the intent to remain indefinitely in Alaska and is not eligible for a dividend.” Presence in the state all through the qualifying year does not guarantee eligibility, and in fact presence on the date of application does not guarantee eligibility for people who have decided to move. A move made before the date of application, or even after the date of application, may be a disqualifying action.

Mr. C. stated that “I realize that the regulations of the department seem to be somewhat more strict but the law itself says ‘consider.’” All of the regulations in 15 AAC 23 are properly regarded as “the law itself.” The Supreme Court has recognized that department regulations may be more strict than applicable statutes, and may exclude from eligibility some applicants who would qualify under the statutory requirements:

We have held that AS 43.23.015(a), the statute concerning proof of eligibility for PFDs, authorizes “and require[s] the Commissioner of the Department of Revenue to promulgate regulations defining substantive eligibility requirements for PFDs.” *State, Dep’t of Revenue v. Bradley*, 896 P.2d 237, 239 (Alaska 1995) (citing *Cosio*, 858 P.2d at 624-25). *Cosio* held that a regulation can “exclud[e] permanent fund dividend applicants who arguably fall within the statutory definition of eligible applicants,” as long as the exclusion is consistent with the statutory purpose and is not unreasonable or arbitrary. *Id.* at 625. In *Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 732 (Alaska 1995), we held that 15 AAC 23.42.175(c)(6), which denies PFDs to seasonal residents, was not beyond the authority of the commissioner to promulgate and that the regulation was consistent with the purpose of AS 43.23.095(8), which is “to limit payment of dividends to permanent residents.” *Id.* The *Brodigan* opinion also stated that a legitimate purpose of the regulation was to “ease the

¹ AS 43.23.005(3), (4).
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administrative burden of attempting to determine what treatment level is sufficient to merit eligibility for a PFD.” *Id.*^[2]

It is possible that an applicant who has moved and claimed a federal tax deduction for the expense before the date of application might still be eligible under the statutory requirements, but such an applicant is not eligible under the more restrictive regulations. Regulations are laws, and so long as they are valid they must be applied as written.

IV. Conclusion

The C.s moved from Alaska before the date of application for reasons other than those listed in AS 43.23.008, and they claimed moving expenses on their federal income tax returns. The C.s are therefore not eligible for 2009 permanent fund dividends. Because they are ineligible for this reason, it is not necessary to examine whether the C.s severed their Alaska residency, whether they are ineligible under 15 AAC 23.143(d)(h), or whether Mr. C. is ineligible because he accepted permanent full-time employment.

The division’s decision to deny the applications of M. and B. C. for 2009 permanent fund dividends is AFFIRMED.

DATED this 31 day of December, 2009.

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 28th day of January, 2010.

By: *Signed* _____
Signature
Dale Whitney _____
Name
Administrative Law Judge _____
Title

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

² *Church v. State, Dept. of Revenue*, 973 P.2d 1125, 1128 (Alaska, 1999).
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