

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

In the Matter of:	)	
	)	
B. A. R. and	)	
A. M. and	)	
E. R.	)	
(minor children)	)	
	)	OAH No. 10-0020-PFD
<u>2009 Permanent Fund Dividend</u>	)	Agency No. 2009-035-7754

**DECISION**

**I. INTRODUCTION**

Lieutenant Colonel B. A. R. applied for the 2009 Permanent Fund Dividend (PFD).<sup>1</sup> He was also the sponsor for his three children, A., M., and E.<sup>2</sup> The Permanent Fund Dividend Division (Division) denied Lt. Col. R.’ application pursuant to AS 43.23.008(c). The Division denied the applications of his minor children because they did not have an eligible sponsor.<sup>3</sup> Lt. Col. R. requested an informal appeal of these decisions. The Division upheld its original decisions and Lt. Col. R. has now requested a formal appeal.

Lt. Col. R. testified and argued his case by phone at the hearing. The Division was represented by Ms. Bethany Chase who also appeared by phone.

Because Lt. Col. R. was absent from Alaska for more than 180 days during each of the preceding 10 years, and because he was absent for more than 180 days during the qualifying year for the 2009 PFD, he is not eligible for the 2009 PFD. The minor children are also not eligible for the 2009 PFD because they do not have an eligible sponsor.

**II. FACTS**

None of the relevant facts are in dispute in this case.<sup>4</sup> The only question to resolve on appeal is whether Lt. Col. R. is legally eligible to receive a 2009 PFD. Lt. Col. R. is a life-long Alaska resident. After graduating high school, he attended the United States Naval Academy.<sup>5</sup> Since graduating from the Naval Academy, Lt. Col. R. has served in the United

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<sup>1</sup> Exhibit 1.

<sup>2</sup> Exhibit 1, pages 4 – 9.

<sup>3</sup> Exhibit 6, pages 3 – 8.

<sup>4</sup> The facts discussed in this section are based on Lt. Col. R.’ testimony in addition to the cited documents.

<sup>5</sup> Exhibit 9, page 6.

States Marine Corps.<sup>6</sup> He has returned to Alaska often during his military service.<sup>7</sup> He maintains significant paper contacts with Alaska, votes in Alaska, and owns real estate in the state.<sup>8</sup> Despite having been stationed in six different states since his enlistment in the Marines, Lt. Col. R. has never taken any step to become a resident of any other state.

Lt. Col. R. has been eligible for every PFD since 1982, including each of the past 10 PFDs. For each of the qualifying years related to those last 10 PFDs, Lt. Col. R. was absent from the state for more than 180 days. He was also absent for more than 180 days during 2008, which is the qualifying year for the 2009 PFD.<sup>9</sup>

### III. DISCUSSION

Lt. Col. R. has been and continues to be a resident of Alaska.<sup>10</sup> Being a state resident is a necessary qualification to be eligible to receive a PFD, but it is not the only requirement. One of the other requirements is that an applicant be physically present in Alaska during the entire qualifying year or, if not present, be absent for one of several allowable reasons listed in statute.<sup>11</sup>

Lt. Col. R. and his children have qualified for previous PFDs because they were eligible under AS 43.23.008(a)(3) which permits extended absences by active duty military members and their families. This allowable absence is not unlimited, however. The specific limitation relevant to this case is AS 43.23.008(c) which provides:

An otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year. This subsection does not apply to an absence under (a)(9) or (10) of this section or to an absence under (a)(13) of this section if the absence is to accompany an individual who is absent under (a)(9) or (10) of this section.

This subsection will most commonly apply to active duty military personnel and their families, though it can also apply to individuals claiming other allowable absences under AS 43.23.008(a). This subsection was adopted by the legislature in 1998, but was made applicable only for absences beginning January 1, 1998 or thereafter. Because it has not been applied to absences

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<sup>6</sup> Exhibit 9, page 6.

<sup>7</sup> Exhibit 6, page 6.

<sup>8</sup> Exhibit 6, page 7.

<sup>9</sup> Exhibit 1, page 12

<sup>10</sup> See Alaska Statute AS 01.10.055(c).

<sup>11</sup> AS 43.23.005(a)(6).

prior to 1998, the 2009 application period was the first time applicants could fall within the exclusion set out by this subsection.

The first issue to be addressed is whether this statute even applies to Lt. Col. R. Lt. Col. R. asserts that his absence began in 1990 when he left to attend the Naval Academy. He claims that since his absence began prior to 1998, subsection (c) would be inapplicable. While it is true that his military career began in 1990, Lt. Col. R. has returned to and left Alaska many times since that year. Presence in Alaska is the starting point for determining eligibility. The Division then looks at each absence, both separately and cumulatively, to determine whether an individual remains eligible despite those absences. Lt. Col. R. was absent for more than 180 days in 1998, and he had periods of absence totaling more than 180 days for each of the subsequent qualifying years. Because he had multiple absences after January 1, 1998, this statute does apply to Lt. Col. R.

To remain eligible for a PFD an Alaskan must have an absence no longer than 180 days once every ten years.<sup>12</sup> Lt. Col. R. notes that this is not legally possible for people serving in the military. Military personnel only receive 30 days of leave each year, and there is a limit to how many days they can carry over from one fiscal year to another.<sup>13</sup> While some Air Force and Army personnel may be posted to Alaska, others will not be offered the opportunity to serve in Alaska. This is especially true for those in the Marine Corps.<sup>14</sup> This statute places career military personnel in the difficult position of choosing between service to country and receiving a PFD.

There are many careers that can not easily be pursued in Alaska or that may result in out of state transfers.<sup>15</sup> Recognizing that military service is a special class of career, Alaska law makes it easier for members of the military to remain eligible for the Permanent Fund Dividend during extended absences.<sup>16</sup> How far to extend that special recognition is a policy question for the legislature to resolve. In this case, the legislature extended that recognition for ten years.

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<sup>12</sup> In other words, he or she must be present in Alaska for at least 185 days during at least one qualifying year.

<sup>13</sup> Exhibit 9, page 3.

<sup>14</sup> Lt. Col. R. testified that there is only one position in Alaska for a Marine Corps officer, and that he is now too senior in rank to obtain that position.

<sup>15</sup> For example, diplomats working overseas for the State Department will likely be absent from Alaska for more than 180 days each year. Executives working in the oil industry might be required to transfer to locations outside of Alaska as a condition of continued employment.

<sup>16</sup> Military service is one of the allowable absences listed in AS 43.23.008(a) and one of only a few allowable absences likely to last as long as 10 years.

With certain exceptions, any individual who is gone from Alaska for more than ten years will not be eligible to receive a PFD.

Lt. Col. R. also notes that this subsection does not apply to Members of Congress or their staff, and does not apply to family members accompanying those individuals.<sup>17</sup> He argues that this unconstitutionally discriminates against military personnel. Military personnel are federal employees who are serving their country in positions as honorable as those working in Congress. The legislative history does not indicate why Congressional staff and Members of Congress were excluded from subsection (c). It may be simply a matter of perceiving a lesser opportunity for abuse by Members of Congress and Congressional staff. Whatever the reason, deciding which out-of-state residents qualify for a PFD is a policy question that is appropriately left to the legislature to resolve.

Lt. Col. R. also refers to the legislative history of subsection (c).<sup>18</sup> He suggests that, based on the committee meeting minutes, the change in the law was intended to address individuals who originally qualify as Alaska residents and then leave the state with no true intent of ever returning. These individuals maintain minimum contacts with the state in order to continue receiving an annual PFD. Based on the legislative history, it does seem this was one problem the legislature was attempting to address. In addressing this issue, the legislature was not required to create the perfect solution to this problem. While the legislature could have adopted a solution that allowed a more individualized focus on each applicant's true intent, it was not required to do so. The solution adopted is an easily applied rule that can be efficiently applied to the hundreds or possibly thousands of out-of-state applications received every year. This rule will exclude some individuals, like Lt. Col. R., who can make a very compelling case for why they should remain eligible. But the fact that this solution may cast a wide net does not make it invalid or inapplicable in this case.

Finally, Lt. Col. R. argues that this law did not exist in 1990 when he first entered the Naval Academy. Nor did the law exist when he graduated and embarked on his 20 year military career. The legislature did change the eligibility requirements after Lt. Col. R. committed to his career. When asked, Lt. Col. R. very candidly and credibly stated that his decision to begin a career in the military probably would not have changed if this law had existed in 1990, but it

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<sup>17</sup> AS 43.23.008(c).

<sup>18</sup> Exhibit 9, page 4.

would certainly have been a factor he would have thought about. This answer suggests that at least some Alaskans, when considering their futures, may decide against a military career. Information like this is what the legislature considers when enacting or amending statutes. The legislature can weigh the negative impacts of this subsection along with its positive impacts in deciding whether any future legislative changes are appropriate. As it is written now, however, this subsection is valid. Eligibility for a PFD is not a fundamental right and the legislature is permitted to make changes regarding who is eligible.<sup>19</sup> That is all it did when it enacted subsection (c) in 1998.

Because Lt. Col. R. is not eligible to receive the 2009 PFD, his minor children are also not eligible. Lt. Col. R. filed PFD applications on behalf of his three children.<sup>20</sup> Normally, children accompanying an active duty member of the armed forces would be eligible to receive a PFD.<sup>21</sup> However, the active duty service member they are accompanying must also be eligible.<sup>22</sup> Because Mr. R. is not eligible, his children are not accompanying an individual who is eligible, and therefore they are ineligible to receive a 2009 PFD.<sup>23</sup>

#### IV. CONCLUSION

Lt. Col. R. raises legitimate questions about the means selected by the legislature to determine who should remain eligible to receive a PFD despite lengthy absences from the state. Those questions are properly left to the legislative process, however, where the pros and cons of various solutions can be discussed and debated. Based on the statute as it is currently written, the Division's determination that Lt. Col. R. and his three children are not eligible for a 2009 PFD is upheld.<sup>24</sup>

DATED this 18th day of February, 2010.

By: Signed  
Jeffrey A. Friedman  
Administrative Law Judge

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<sup>19</sup> *Underwood v. State*, 881 P.2d 322, 325 (Alaska 1994)

<sup>20</sup> Exhibit 1, pages 4 – 9.

<sup>21</sup> AS 43.23.008(a)(3).

<sup>22</sup> AS 43.23.008(a)(3)(B).

<sup>23</sup> *See also*, 15 AAC 23.113(b)(1) (child's sponsor must be eligible).

<sup>24</sup> Left undecided by this decision is whether Lt. Col. R. and his children will be eligible for the 2010 PFD. The plain language of AS 43.23.008(c) suggests that they might be eligible since Lt. Col. R. will not have been eligible for the 2009 PFD and therefore is not eligible for the 10 dividends immediately preceding the 2009 dividend.

## 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 1<sup>st</sup> day of April, 2010.

By: Signed  
Signature  
Virginia Blaisdell  
Name  
Director, Administrative Services Division  
Title

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