

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

In the Matter of:)	
)	
M. P.)	OAH No. 10-0031-PFD
)	Agency Nos. 2008-064-7030
<u>2007 and 2008 Permanent Fund Dividends</u>)	and 2008-064-7087

DECISION

I. INTRODUCTION

Mr. P. applied for a 2007 and a 2008 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (Division) denied his applications as untimely. During the appeal, the Division also asserted that Mr. P. severed his residency in Alaska when he indicated on his 2006 PFD application that he did not intend to return to Alaska. Mr. P. appealed the denial of the 2007 and 2008 PFD applications. He was again denied at the informal level and has now requested a formal appeal.

A hearing was held on February 25, 2010. Both parties appeared by phone. Because Mr. P.'s applications were not timely, the Division's denial of those applications is upheld.

II. FACTS

Mr. P. was on active duty military service outside of Alaska beginning in July of 2001.¹ He was deployed in Iraq from May of 2007 through May of 2008.² His 2007 and 2008 PFD applications were both signed on August 31, 2008 and were received by the Division on September 3, 2008.³ The applications and supporting documents appear to have been faxed on September 2, 2008.⁴ Mr. P. testified that he received hazard duty pay during his deployment to Iraq which ended in May of 2008.

III. DISCUSSION

E-mail exchanges included in the record indicate that when his applications were received, the Division first attempted to clarify Mr. P.'s military status, the dates of his hostile fire pay, and an indication on Mr. P.'s Leave and Earnings Statement that showed legal residence

¹ Exhibit 1, page 6.
² Exhibit 1, page 6.
³ Exhibit 1, page 1 and page 5.
⁴ Fax header on Exhibit 1.

in Washington.⁵ By the time the Division denied his applications, however, those issues had been resolved and the only basis for the denials was that the applications were not timely.⁶

For each dividend year, there is a three-month application period that starts on January 1, and ends on March 31 of the relevant year.⁷ An application is considered untimely if it is not postmarked or received by the last day of the application period.⁸ The applicant has the responsibility of ensuring that his application is postmarked or received by this deadline.⁹ The legislature has allowed exceptions to the filing deadline only for certain military personnel,¹⁰ certain children when their parents or guardians failed to apply for them,¹¹ and certain disabled individuals.¹²

None of the limited exceptions to the March 31 deadline apply to Mr. P.'s 2007 PFD application. This application was received well over a year after the application period ended on March 31, 2007. Under the applicable statutes and regulations, the Division had no discretion to do anything other than deny Mr. P.'s 2007 application.

Mr. P.'s 2008 PFD application raises a closer question. An active duty member of the armed forces who was receiving hostile fire or imminent danger pay during the application period is allowed additional time to apply for a PFD.¹³ That application must be made "within 90 days after the last day the individual was eligible for hostile fire or imminent danger pay."¹⁴

Mr. P. testified that he was receiving hostile fire pay from May of 2007 through May of 2008. He did not indicate precisely which day was the last day he was eligible for hostile fire pay.¹⁵ For purposes of this decision, it will be assumed that the last day of hostile fire pay was May 31. Mr. P.'s application was not received by the Division until September 3, 2008. That is 95 days after he last received hostile fire pay. Even if August 31 – the date Mr. P. signed his application is used – that is 92 days after he last received hostile fire pay. While very close to

⁵ Exhibit 2, pages 14 – 19.

⁶ Exhibit 3, pages 1 and 4.

⁷ Alaska Statute AS 43.23.011(a).

⁸ Alaska Regulation 15 AAC 23.103(a)

⁹ 15 AAC 23.103(g).

¹⁰ AS 43.23.011(b)-(c).

¹¹ AS 43.23.055(3).

¹² AS 43.23.055(8).

¹³ AS 43.23.011(b).

¹⁴ AS 43.23.011(b).

¹⁵ The Division's Formal Hearing Position Statement says that his last day of hostile fire pay was May 15, but there is no admissible evidence in the record confirming that particular date.

the 90 day limitation, the Division had no discretion under this exception to extend the 90 day time period.

There is, however, some limited discretion under AS 43.23.011(c). The commissioner may permit a late application if the applicant was receiving hostile fire or imminent danger pay and the applicant “demonstrates a reasonable cause for the delay in applying for that dividend.”¹⁶ Mr. P. has the burden of proving that the denial of the application was incorrect.¹⁷ In this case, Mr. P. testified about the substantial efforts he took to resolve his eligibility status but he did not testify concerning the delay in submitting his application after he returned from Iraq in 2008.

Mr. P. returned to Alaska from a combat posting overseas. That fact alone could be considered a reasonable cause for some delay, and state law acknowledges this by granting an automatic 90 day period to all military personnel returning from combat situations.¹⁸ To qualify for additional delay under AS 43.23.011(c), Mr. P. must show reasonable cause for why the Division did not receive his application within 90 days of the last day he received hostile fire pay. Mr. P. has not shown that his return from overseas combat duty differed in any way from other military personnel returning from combat duty. Because Mr. P. has not met his burden of proof on this issue, the Division’s decision denying his PFD application is upheld.

The Division has also asserted that Mr. P. severed his residency in 2006. Mr. P.’s 2006 application indicated that he was not present in Alaska and did not intend to return.¹⁹ Based on this, it was determined in 2006 at the informal appeal level that Mr. P. was no longer a state resident.²⁰ Mr. P. had an opportunity to dispute the finding that he was no longer a resident and a factual finding was made against him. Normally, this would be binding on Mr. P. under a legal doctrine known as collateral estoppel.²¹ This doctrine holds that parties to a dispute are generally bound by the findings made in prior litigation that they have been involved in.

There are special circumstances in this case, however, that suggest no ruling should be made on this issue. Mr. P. testified that he did not learn about the 2006 determination until 2008 when he was trying to resolve his current eligibility status. That suggests that he would not have known of his right to request a formal hearing to appeal that determination. Mr. P. testified that

¹⁶ AS 43.23.011(c)(2).

¹⁷ 15 AAC 05.030(h).

¹⁸ AS 43.23.011(b).

¹⁹ Exhibit 7, page 10.

²⁰ Exhibit 7, page 1.

²¹ *See Harrod v. State of Alaska*, 4FA 07-1224 CI.

the box indicating no intent to return had been marked by mistake. Thus, he may have prevailed if he had contested this determination. On the other hand, the Division may have more evidence on this issue that would contradict Mr. P.'s position. Because resolution of Mr. P.'s state residency is not necessary to determine eligibility of Mr. P.'s 2007 or 2008 PFD eligibility, no findings will be made concerning whether Mr. P. did or did not sever his residency in 2006.

IV. CONCLUSION

Mr. P.'s 2007 and 2008 PFD applications were not timely and there is no applicable exception that would permit the Division to accept those applications. Accordingly, the Division's determination that Mr. P. is not eligible for a 2007 or a 2008 PFD is upheld.

DATED this 26th day of February, 2010.

By: Signed
Jeffrey A. Friedman
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 30th day of March, 2010.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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