

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

In the Matter of:)	
)	
A. J. W.)	OAH No. 10-0042-PFD
)	Agency No. 2009-047-9443
<u>2009 Permanent Fund Dividend</u>)	

DECISION

I. INTRODUCTION

A. J. W. applied for a 2009 Permanent Fund Dividend (PFD). His application was denied by the Permanent Fund Dividend Division (Division) because Mr. W. had been eligible for each of the prior ten PFDs despite being absent for more than 180 days during each qualifying year, and was also absent for more than 180 days during 2008, the qualifying year for a 2009 PFD. Mr. W. completed the informal appeal process and has now requested a formal hearing.

At the beginning of the hearing, Mr. W. stated that he had not received notice of the hearing date. He said he had received the Division's Formal Hearing Position Statement and exhibits. Despite not receiving the formal notification, Mr. W. stated that he wished to go forward with the hearing and he testified by phone. Ms. Bethany Chase appeared by phone on behalf of the Division.

Because there is no discretion to allow for payment of a PFD under these circumstances, the Division's decision is upheld.

II. FACTS¹

Mr. W. served in the Marine Corps for over 20 years, and retired in 2008 as a Lieutenant Colonel.² He has always considered himself to be an Alaska resident and always intended to return to Alaska when he retired from the Marine Corps. Mr. W. testified that he had scheduled his retirement to bring him back to Alaska in time to qualify for the 2009 PFD. He moved his household goods and family back to Alaska in 2007, and his retirement date would have allowed him to return to Alaska by the end of May in 2008.³ Mr. W.'s retirement from the Marine Corps was delayed, however. Because of the needs of the service, he remained on active duty through

¹ The facts stated here are based on Mr. W.'s testimony unless otherwise indicated.

² Exhibit 1, page 5.

³ Exhibit 6, page 3.

August of 2008.⁴ During that time he was stationed overseas in combat duty. He was absent from Alaska from January 15, 2008 through September 14, 2008.⁵

Mr. W. has now returned to Alaska. Mr. W. owns a home in Alaska, has his vehicles registered in Alaska, is registered to vote here, and has an Alaska driver license.⁶ The only reason that Mr. W. was not in Alaska for more than 180 days during 2008 was the involuntary delay in his retirement date coupled with his overseas assignment.

III. DISCUSSION

There is no dispute here that Mr. W. is and has been a resident of Alaska at least through the date of his PFD application.⁷ The question in this case is whether he meets the other requirements for receipt of a PFD. Among those other requirements, one must be physically present in Alaska during the entire qualifying year or absent for one of the allowable reasons defined by state statute.⁸ Active duty military service is one of the listed allowable absences.⁹ This allowance is not unlimited, however. The legislature has adopted a ten-year rule applicable to most long term absences, including military absences.¹⁰

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.¹¹

Mr. W. stated during the hearing that he understood the terms of this statute. He suggested in his appeal paperwork and at the hearing that there should be an exception for circumstances such as his, and questioned whether the legislature intended to deny a PFD to a member of the military who missed qualifying simply because his retirement date was extended for reasons beyond the applicant's control.

⁴ Exhibit 6, page 3.

⁵ Exhibit 1, page 2.

⁶ Exhibit 4, pages 7 – 9.

⁷ Alaska Statute AS 43.23.005(a)(2).

⁸ AS 43.23.005(a)(6).

⁹ AS 43.23.008(a)(3).

¹⁰ This rule was passed by the legislature in 1998 and first impacted applicants applying for 2009 PFDs.

¹¹ AS 43.23.008(c). The exceptions to this rule apply to Members of Congress, their staff, and family members accompanying Members of Congress or their staff.

This statute was adopted as part of HB 2 during the second session of the 20th Legislature.¹² The undersigned ALJ has not been able to find any legislative history directly discussing the intent of the 10 year rule.¹³ The committee minutes focus mostly on other sections of HB 2, though there are a few mentions of the desire to distinguish between applicants who truly intend to return and those who do not. Ultimately, the legislature adopted a bright line rule that does not allow for any exceptions. This is different than the scheme used by the five year rule. The five year rule creates a presumption that someone who has not returned to Alaska for at least 30 days during the last five years is no longer a resident.¹⁴ This presumption is difficult to overcome, but it is not irrefutable.¹⁵ The legislature could have adopted a similar presumption for the 10 year rule which would have allowed applicants like Mr. W. an opportunity to demonstrate their continued eligibility for a PFD. Instead, the statute adopted by the legislature is absolute, and nothing in the legislative history suggests that this is not what the legislature intended.

IV. CONCLUSION

Mr. W. has received a PFD each year despite being absent from Alaska for more than 180 days in each of the prior ten qualifying years. He was also absent for more than 180 days during 2008. The law does not allow for the receipt of a PFD in this situation even though Mr. W. continues to be an Alaska resident. The Division's denial of Mr. W.'s application is affirmed.

DATED this 3rd day of March, 2010.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

¹² Chap 44 SLA 98.

¹³ See Minutes of: House Finance Committee January 30, 1997; Senate State Affairs Committee February 20, 1997; Senate Finance Committee May 7 and May 8, 1997; Senate Finance Committee January 20, 1998; Senate Finance February 9, 1998; and Senate Rules Committee April 14, 1998.

¹⁴ Alaska Regulation 15 AAC 23.163(g) & (h).

¹⁵ See, e.g., *In the Matter of R.T. and Child C.T.*, OAH Case No. 05-0409 PFD.

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.]