

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

In the Matter of:	)	
	)	
C. D. B. and	)	
A. B. (minor child)	)	
	)	OAH No. 10-0054-PFD
<u>2009 Permanent Fund Dividend</u>	)	Agency Nos. 2009-012-8008/8246

**DECISION**

**I. Introduction**

C. B. applied for a 2009 Permanent Fund Dividend (PFD) for herself and for her daughter. The Permanent Fund Dividend Division (Division) denied these applications because the applicants were no longer accompanying Ms. B.'s husband, who is an active duty member of the military deployed to Afghanistan during the relevant time period. Ms. B. completed the informal appeal process, and has now requested a formal hearing.

A hearing by correspondence was held in this matter. The Division filed its Formal Hearing Position Statement in response to this appeal. Ms. B. did not file a Hearing Position Statement, but did file a Rebuttal to the Division's position statement. She also filed additional documents which have been marked as Exhibit 23.<sup>1</sup> In response, the Division filed a supplemental hearing statement. While not technically allowed under the February 8, 2010, Notice of Hearing by Correspondence, this supplement was considered as it helps clarify the key issues in this dispute.<sup>2</sup>

Based on the evidence presented and the arguments made by each party, the Division's denial of these applications is reversed.

**II. Facts**

The relevant facts are not disputed in this matter. Ms. B.<sup>3</sup> submitted an application for a 2009 PFD, and indicated that she was out of state accompanying a military spouse.<sup>4</sup> Her

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<sup>1</sup> Ms. B. marked these as Exhibits 1 and 2, but they have been renumbered to avoid confusion with documents already assigned those numbers.

<sup>2</sup> In the Notice of Hearing by Correspondence, the parties were informed that they could submit additional documents or explanation. Either party would then have ten days to submit a response to those submissions. The parties were not given an opportunity to file an additional reply to any response.

<sup>3</sup> For clarity purposes, this Decision will generally discuss Ms. B.'s application and eligibility. The same analysis applies to her daughter's eligibility.

husband was stationed at Ft. Campbell, KY, and the family was living in a rented home in Tennessee.<sup>5</sup> Her husband was deployed to Afghanistan, and Ms. B. was not permitted to travel with him to a combat zone.<sup>6</sup> She decided to live temporarily with her parents in Illinois.<sup>7</sup> This is 220 miles and 3 ½ hours away from Ft. Campbell.<sup>8</sup> While in Illinois, Ms. B. continued to have access to medical and family services provided at Ft. Campbell.<sup>9</sup>

According to the Division's calculation, during the 2008 qualifying year, Ms. B. was in Alaska for 16 days, accompanying her spouse for 128 days, and living with her parents for 222 days.<sup>10</sup> Other calculations appear in the record but there is no dispute that Ms. B. was absent from Alaska and physically apart from her husband for more than 180 days.

While Ms. B. was in Illinois, the family stored its household goods in No Name, Tennessee.<sup>11</sup> At the end of his deployment, Mr. B. returned to Ft. Campbell and Ms. B. joined him there. They have since been transferred to Charlottesville, Virginia where Ms. B. is aware of service members who live two hours away from their duty assignment.<sup>12</sup>

### **III. Discussion**

This case presents the question of what it means to be accompanying one's spouse while that spouse is overseas on a combat assignment. This Decision does not address situations where military families are able to live at the same location but choose to live apart for reasons of their own.

Eligibility for a PFD is dependent on a number of factors. One requirement is that the applicant be physically present in Alaska during the entire qualifying year or absent only for an allowable reasons.<sup>13</sup> The allowable absences relevant in this case are:

(3) serving on active duty as a member of the armed forces of the United States or accompanying, as that individual's spouse, minor dependent, or disabled dependent, an individual who is

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<sup>4</sup> Exhibit 1, page 3.

<sup>5</sup> Exhibit 18, page 3.

<sup>6</sup> Exhibit 7, page 3.

<sup>7</sup> Exhibit 7, page 3.

<sup>8</sup> Exhibit 19, page 4. There are two versions of Exhibit 19 in the record; one with handwritten explanatory notes, and one without. Because it is unclear who wrote the explanatory notes, only the first version will be relied on.

<sup>9</sup> Exhibit 18, page 3.

<sup>10</sup> Division's Formal Hearing Position Statement, page 5.

<sup>11</sup> Exhibit 18, page 3; Exhibit 22, pages 4 & 5.

<sup>12</sup> Exhibit 18, page 3.

<sup>13</sup> Alaska Statute AS 43.23.005(a)(6).

(A) serving on active duty as a member of the armed forces of the United States;  
and

(B) eligible for a current year dividend.

\* \* \*

(17) for any reason consistent with the individual's intent to remain a state resident, provided the absence or cumulative absences do not exceed

(A) 180 days in addition to any absence or cumulative absences claimed under (3) of this subsection if the individual is not claiming an absence under (1), (2), or (4) – (16) of this subsection.<sup>14</sup>

Based on these provisions, Ms. B. could remain eligible for a PFD if she was absent for no more than 180 days in addition to any time spent accompanying her husband.

The problem in this case arises from the fact that Ms. B. cannot physically be with her husband in a combat zone. There is no definition in statute or regulation of “accompanying” applicable to this situation. Neither party has cited any prior decisions that would help resolve this question. A strict interpretation of “accompanying” would suggest that since Ms. B. did not go with her husband to Afghanistan, she is no longer on an allowable absence. This interpretation would mean that military families would continue to be eligible for a PFD while the service member has a non-combat assignment, but would lose their eligibility when the service member is deployed to a combat assignment.

Recognizing that the legislature probably did not intend to automatically disqualify families of deployed service members, the Division agrees that a broader definition of “accompanying” is appropriate. The question then becomes what that definition should be in the absence of a formally adopted regulation.

The Division asserts that a person is deemed to be accompanying their spouse during a deployment if they remain at the service member's current Permanent Duty Station, move to the service member's next duty station, if known, or return to Alaska.<sup>15</sup> Unfortunately, this interpretation would not resolve all disputes regarding whether a military spouse qualifies as an accompanying spouse. As Ms. B. asks, how many miles away from the assigned base can you live and still be living at the Permanent Duty Station?<sup>16</sup> The Division answers this question by stating that one must live within the service member's Basic Allowance for Housing (BAH)

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<sup>14</sup> AS 43.23.008(a)

<sup>15</sup> Division's Formal Hearing Position Statement, page 3. *See also In the Matter of M.N.T. and N.A.T. Jr.*, OAH No. 06-0715 PFD, page 3.

<sup>16</sup> Exhibit 18, page 3.

geographic area.<sup>17</sup> This is not an entirely satisfactory solution, however, because the military services have not defined any BAH geographic areas. Instead, a BAH dollar value is determined for the location of the military installation. Service members are then permitted to live anywhere they wish while assigned to that duty location:

The policy decision to use duty location as a basis for BAH is based on the desire to compensate members for the typical housing cost near the member's duty location. Once the duty station is known, the BAH compensation is fixed, regardless of where the member lives. . . . The Services decided to base the allowance on the duty location with the full knowledge that members would still be free to live where they choose, but that this decision would not affect the BAH amount.<sup>18</sup>

Requiring a spouse to live in a location that had the same BAH compensation amount as the assigned duty location could lead to illogical results in some cases.

At Fort Campbell, Kentucky, for example, many Soldiers choose to live in Nashville, TN, which had a 2009 BAH rate \$1361.00. Even though they lived in Nashville – generally an hour commute and another state – they would still receive the Fort Campbell BAH rate \$1371.00. Under the Alaska Department of Revenue's analysis, a spouse of a Soldier [sic] living in Nashville would have to move closer to the installation when their spouse deployed in order to meet the Alaska Department of Revenue's interpretation of living at the "permanent duty station." . . . I currently have a friend whose husband lives two hours away from his current duty station of Charlottesville, VA and commutes four hours each day from Fairfax, VA. Under the Department of Revenue's analysis she would have to move to the duty station of her husband deployed in order to be considered located at the permanent duty station.<sup>19</sup>

For its part, the Division asserts that Ms. B.'s position would also lead to what it views as an extreme result:

If the Division were to adopt this DOD policy – as stated in FAQ #20 – for determining eligibility of military dependents who are absent from Alaska to accompany a military spouse, the military dependents, conceivably, could live anywhere in the world, regardless of where the military member was stationed – and still remain eligible for a Permanent Fund Dividend.<sup>20</sup>

For this reason, the Division maintains that the dependents must live in one of three locations:

- The service member's current Permanent Duty Station;

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<sup>17</sup> Division's Formal Hearing Position Statement, page 6; Exhibit 21.

<sup>18</sup> Exhibit 23, page 9. Frequently Asked Questions, Q20.

<sup>19</sup> Ms. B.'s Formal Hearing Rebuttal.

<sup>20</sup> Formal Hearing Supplemental - Position Statement, page 1.

- the service member’s “follow on” Duty Station, if known; or
- somewhere in Alaska.<sup>21</sup>

At first glance, the Division’s interpretation is a reasonable attempt to both comply with AS 43.23.008(a)(3) and at the same time allow flexibility for families during deployment. Closer examination, however, reveals a fundamental problem: there is no geographic limitation to the service member’s assigned duty station. Duty station is not defined by either military regulations or Department of Revenue Regulations. Dependents of deployed service members have no way of knowing in advance whether they must live within 25 miles or 250 miles of the military installation in order to remain eligible for a PFD. There are simply no objective criteria in statute or regulation to determine whether military dependants are “accompanying” a service member when they are not permitted to be physically with that service member.

When a service member is assigned combat duty, his or her dependants are not legally allowed to physically accompany the service member to that assignment. In these situations, the dependents are typically physically separated from the service member by thousands of miles. The distance is large regardless of where the at-home spouse is temporarily living. Focusing on the precise physical location of a spouse during this time period places an unnecessary hardship on families during deployment and does not recognize the realities of military life. Military families move often and may not have any relatives or friends near the service member’s official duty station while he or she is deployed. Deployed service members want to know that their family is safe and well-cared for while they are away. It is not unreasonable that a spouse would live temporarily at a location where he or she can find support while the service member is deployed.

At least until there is a statute or regulation defining “accompanying,” a spouse should be deemed to be accompanying a military member pursuant to AS 43.23.008(a)(3) regardless of where he or she is temporarily living during any time when, by statute or military regulation, the spouse is not permitted to be at the same physical location as the service member.<sup>22</sup> This would avoid the need to decide on a case-by-case basis whether the spouse has moved “too far” from the duty assignment and would also avoid placing added stress on families during deployment.

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<sup>21</sup> Formal Hearing Supplemental - Position statement, page 2.

<sup>22</sup> Of course, the spouse would still need to avoid taking any action that would make him or her ineligible for other reasons. *See, e.g.*, 15 AAC 23.143. It must also be apparent that the family intends to reunite after the deployment.

One other issue needs to be addressed briefly. The Division also determined that Ms. B. was ineligible because she established a principal residence in Tennessee.<sup>23</sup> Because Ms. B. was still accompanying her husband, establishing a principal home in another state does not make her ineligible.<sup>24</sup> This would be true regardless of whether her principal home was in Tennessee or with her parents in Illinois.<sup>25</sup>

#### IV. Conclusion

Ms. B. and her minor daughter were not legally allowed to physically reside with Mr. B. during his deployment, their move away from Ft. Campbell was only temporary, and they took no other action that would cause them to be ineligible. Accordingly, they are each eligible to receive a 2009 PFD and the Division's denial of their applications is reversed.

DATED this 22<sup>nd</sup> day of March, 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 23<sup>rd</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.]

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<sup>23</sup> Exhibit 10, page 1.

<sup>24</sup> 15 AAC 23.143(d)(1)(A).

<sup>25</sup> On appeal, the Division suggests that Ms. B.'s principal home was in Illinois. Formal Hearing Position Statement, page 5. Since Ms. B. left her household goods in Tennessee and viewed her living arrangement with her parents as temporary, it is more likely true than not true that she did not establish a principal home in Illinois.