

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

In the Matter of:)	
)	
P. O.,)	
V. O., and)	
B. O. (minor))	
)	OAH No. 10-0444-PFD
<u>2010 Permanent Fund Dividend</u>)	Agency No. 2010-010-6397

DECISION AND ORDER

I. Introduction

United States Air Force Sergeant P. C. O. and his family timely applied for 2010 Permanent Fund Dividends (PFDs). Despite continuing contacts with Alaska and periodic visits, the O.s fell short of the thirty-days-in-five-years threshold that is usually required to preserve PFD eligibility. The Permanent Fund Dividend Division applied the double presumption of ineligibility for people absent from the state more than five years who do not visit for thirty days in the five years, and denied the family's applications initially and at the informal appeal level. At the O.s' request, a formal hearing was held on October 4, 2010.

This is a close case, because the evidence taken at the hearing makes it appear more likely than not that the O.s presently have concrete plans to return to Alaska and will resume living full-time in the state early in 2011. Nonetheless, the evidence the O.s have brought forward is not so compelling as to overcome the double presumption of ineligibility that applies to them, and the Division's action will be upheld. This decision does not represent a finding that the O.s are not Alaska residents; it finds only that they have not proved by clear and convincing evidence that they are. It does not prevent a finding in any future year, if one or both of the presumptions have been removed, that they are eligible for dividends.

II. Facts

Unless otherwise attributed, the facts set out below are based on Sgt. O.'s testimony at the hearing.

Sergeant O. has made his career in the military and will be retirement-eligible early in 2011. In the course of his military career, he was posted to Alaska in 2000, remaining in the state for just over four years.

V. O. also moved to Alaska in 2000 to join her sister here (her sister still lives in Alaska). She and Sgt. O. met and married in Alaska.

In 2004 Sgt. O. received military orders to move to Texas.¹ He and V. O. sold their home in Alaska and purchased a home in Texas but did not claim a homestead tax exemption. Sgt. O.'s military specialty is no longer performed in Alaska, and changing career fields would require too many years of training to be practical at his stage of his career. For these reasons, he has not sought reassignment to Alaska.

The O.s retain some formal ties to Alaska, including drivers license, voter registration, and vehicle registration. Alaska is Sgt. O.'s state of legal residence in his military personnel records.

At the time they applied for the 2010 dividend, Sgt. and Mrs. O. had no concrete plans for retirement; he expected to retire sometime in the next five years.² More recently, Sgt. O. has applied for retirement and has obtained his commander's approval to retire in early 2011. Final approval by the Air Force personnel center is pending. In anticipation of the approval, the O.s have put their house in Texas on the market.

After the house sells, Sgt. O. plans to move to Alaska, where he hopes to study accounting at the University of Alaska-Anchorage and to work as a tax preparer. He has not applied to the university or otherwise taken definitive steps toward the Alaska move, but his testimony as to his intent is credible.

In the five years preceding their applications for a 2010 dividend, each of the O.s returned to Alaska on two occasions: once at the turn of the year between 2005 and 2006 (8 days) and once in the summer of 2008 (18 days).³ The total is 26 days over the five-year period.⁴ The O.s planned these visits with a view toward the absolute requirement in AS 43.23.005(a)(4) that, unless there is a special waiver by the Commissioner of Revenue, an individual cannot be eligible without being physically present in the state at least 72 hours in the two years preceding each dividend year. The O.s were unaware of the additional presumptions that relate to presence over a five-year span. There were no extraordinary circumstances preventing the O.s from returning for more than 30 days during the five year span before the 2010 dividend year.

¹ See Exhibit 4, p. 1 (orders).

² Exhibit 3, p. 2 (Extended Absence Questionnaire).

³ Exhibit 3, p. 3.

⁴ This total has been calculated by the method in 15 AAC 23.163(j).

In the fall of 2009, the O.s purchased tickets to return to Alaska for a third visit in the summer of 2010. That visit occurred in June of 2010 and lasted about 11 days.

III. Discussion

To be eligible for a Permanent Fund Dividend, a person must be a state resident at the time of application and during the qualifying year for the dividend in question.⁵ A person establishes residency “by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.”⁶ It is undisputed that Sgt. and Mrs. O. established residency in or shortly after 2000. Once a resident, a person remains so even if absent from the state unless the person “establishes or claims residency” elsewhere—again, it is undisputed that the O.s have not done this—or “performs other acts or is absent under circumstances that are inconsistent with the intent” to remain in Alaska and make a home here.⁷

It is this last provision that presents the single issue in this case. It is undisputed that the O.s were on allowable absence from Alaska while Sgt. O. served in the military.⁸ But the Division contends that the adult O.s have failed to demonstrate with sufficiently convincing evidence that they intend to return to Alaska and make their home here, thus failing to demonstrate their continued Alaska residency. The Division’s contention as to B. is derivative: if the parents are no longer Alaskans, the child has no eligible sponsor.⁹

In reaching its conclusion that the O.s must demonstrate the required intent with very strong evidence and that they have failed to meet this burden, the Division applied two presumptions from the PFD regulations. The regulation at 15 AAC 23.163(f) establishes a presumption that any person who is absent from the state (other than for a reason relating to Congressional service) for more than five consecutive years “is presumed not to have the intent to return to Alaska and remain indefinitely in Alaska.” The presumption is rebuttable. However, 15 AAC 23.163(h) provides that “the department will generally consider” the presumption unrebutted when an individual has not visited the state for at least 30 cumulative days during the five-year period. This provision establishes, in effect, a presumption within the presumption that makes it extraordinarily difficult

⁵ AS 43.23.005(a).

⁶ AS 01.10.055(a).

⁷ AS 01.10.055(c).

⁸ AS 43.23.008.

⁹ In general (with exceptions that do not apply here), children need to be in the lawful and physical custody of a person eligible for a dividend. 15 AAC 23.113.

for a person who lives outside Alaska and visits fewer than 30 days in five years to retain eligibility for a dividend.¹⁰

There is a potential exception to the double presumption. 15 AAC 23.163(h)(2) provides that the 30-day presumption does not apply if “unavoidable circumstances” prevented the individual from returning for 30 days. Here, Sgt. O. concedes that he elected not to spend more time in the state and that no unavoidable circumstances prevented him from doing so. He concedes that the two visits he did make were motivated in part by the need to retain PFD eligibility, but he did not know about the 30-days-in-five-years regulation and so made no effort to meet it. He is not excused from the double presumption.

The department’s regulations provide a list of seven factors that it will consider, where applicable, evaluating the five-year presumption.¹¹ These are reviewed below:

1. *Length of absence compared to time in Alaska before departing.* The O.s lived in Alaska for only four years and, as of their 2010 applications, had subsequently been absent for five and a half. The fact that their absence exceeds the time they lived in the state slightly undermines the strength of their connection to Alaska.

2. *Frequency and duration of return trips to Alaska.* The O.s returned to Alaska only twice over the five-year period, and both visits were brief. This was just enough to satisfy the absolute minimum presence requirement in AS 43.23.005(a)(4), and indeed the O.s planned their visits with that statute in mind. The Revenue regulation expressly provides that return visits “in order to meet the physical presence requirements of AS 43.23.005(a)(4)” are not sufficient in themselves to rebut even the single presumption of ineligibility that applies to people who have more than 30 days of time in the state over the five-year span (which the O.s do not).¹²

3. *Whether intent to return is conditioned on future events beyond the individual’s control, such as economics or finding a job in Alaska.* Having taken essentially no steps to date to arrange employment or apply for college admission in Alaska, the O.s have not made a strong showing that their return is wholly certain and unconditional.

4. *Any ties the individual has established outside Alaska (homes, taxes, voter registration, etc.).* The O.s own a home in Texas, and none in Alaska. This is not a surprising circumstance for people of their economic means, but it does not strengthen the showing they need

¹⁰ The double presumption was so interpreted in *In re V.V.*, OAH No. 07-0104-PFD (Comm’r of Revenue 2007).

¹¹ 15 AAC 23.163(g).

¹² 15 AAC 23.163(g)(2).

to make of strong ties to Alaska. The home in Texas is on the market, which is evidence that the O.s plan to move but is not a specific tie to Alaska.

5. *Priority the individual gave Alaska in employment assignment preference.* Sgt. O. has not pressed for an Alaska assignment, but he explains credibly that with the transfer of his function to Texas it is not practical for him to seek an Alaska posting. This factor is neutral.

6. *Whether the individual chose a career path that does not allow return to Alaska.* This is not true of the O.s in the long run; a military career is conducive to retirement during middle age so that a second career can be pursued in the location of choice. Of course, service in the military can place a short-term impediment on return to Alaska, but it is unlikely that this regulatory factor was intended to cut against members of the military on account of that obvious consequence of military service.¹³

7. *Ties to Alaska such as real property, voter registration, etc.* The O.s have no real estate in Alaska but they retain some paper ties to the state, including voter registration. They also have family ties here.

Factor 7 weighs moderately in favor of the O.s, while factors 1, 2, and 4 weigh slightly against them. Taking all of these factors into account and bearing in mind the double presumption, I find that the O.s have not overcome the steep burden created by the double presumption. While I believe, by a narrow margin, that they retain the intent to return to Alaska to remain indefinitely, their failure to establish this intent with strong objective evidence of the kind envisioned by the regulation leaves them ineligible for a dividend.

IV. Conclusion

Regarding their 2010 dividend, Sgt. and Mrs. O. were subject to a double presumption that they had lost the intent needed to maintain Alaska residency. The evidence they presented, while marginally persuasive, was not so strong as to overcome that double presumption as it is framed in the applicable regulation. Because they are not eligible, their minor child lacks an eligible sponsors is likewise ineligible. The decision of the Permanent Fund Dividend Division to deny the applications of P., V. and B. O. for 2010 permanent fund dividends is AFFIRMED.

¹³ To discriminate against military members because of their “career choice” would be difficult to square with legislative intent, the legislature having gone out of its way to protect the eligibility of people choosing this career path. See AS 43.23.008(a)(3).

V. Note Regarding 2011 and 2012 Dividends

The only finding made in this case is that the O.s have not presented evidence of continuing intent to return that is so strong that it can overcome the extraordinary burden set by the double presumption. This case does not establish that it is more likely than not that the O.s have lost Alaska residency at any time; it establishes only that they have not established *by clear and convincing evidence* that they did have the requisite intent for residency as of the time of their 2010 application. It does not prejudge the correct handling of future dividend years, when the double presumption may not apply as to any facts relevant to that year. This means that the state of the O.s' intent in 2010 can be revisited in reference to future dividend years.

DATED this 5th day of October, 2010.

By: Signed
Christopher Kennedy
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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 7th day of November,2010.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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