

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

IN THE MATTER OF	)	OAH Case No. 10-0468-PFD
	)	
D. C. W.	)	Agency Case No. 2010-032-2149
	)	
<u>2010 Permanent Fund Dividend</u>	)	

**DECISION & ORDER**

**I. Introduction**

D. C. W. timely applied for a 2010 permanent fund dividend (PFD). The Permanent Fund Dividend Division (division) determined that Mr. W. was not eligible, and it denied his application initially and at the informal appeal level. Mr. W. requested a formal hearing. The case was referred to the Office of Administrative Hearings and administrative law judge Mark T. Handley was assigned to hear Mr. W.'s appeal. The hearing was held on October 21, 2010. Both Mr. W. and his wife participated. PFD specialist Bethany Chase represented the Division.

The administrative law judge affirms the division's decision. The laws governing 2010 PFD eligibility disqualify Mr. W. due to his 253-day absence in 2009 because, as a civilian Department of Defense employee, he was not on active duty status with the military, even though he was in uniform serving with active duty personnel and was exposed to the same risks in the service of his country.

**II. Facts**

Mr. W. is now retired from active duty with the military. Mr. W. is a civilian employee of the U.S. Department of Defense in the Army Corps of Engineers, a branch of the U.S. Army. Mr. W. was absent from Alaska for 253 days in 2009, the qualifying year for a 2010 PFD, in order to work for the Department of Defense in Iraq at Camp Liberty. Mr. W. testified that he was working in uniform with protective gear and was exposed to the same hazards as the active duty personnel that he was working with in this hostile war zone that frequently came under attack by enemy insurgents. Ms. W. pointed out the Mr. W. was an employee of the Army and the U.S. Government not a contractor. Ms. W. explained that Mr. W.'s job was to represent the U.S. Government, and supervise contractors to make sure that the contractors did their jobs correctly so that U.S. Army personnel would not be injured by shoddy work. The division has not challenged Mr. W.'s status as an Alaska resident. Mr. W. explained that he was under military orders, but that he was a civilian

U.S. Army employee, and was not serving active duty as a member of the military during his absence.<sup>1</sup>

### III. Discussion

In order to qualify for a permanent fund dividend, the applicant must have been physically present in Alaska all through the qualifying year, or only have been absent for one of the allowable reasons listed in AS 43.23.008.<sup>2</sup> There are two allowable absence reasons that may be considered in this case. First, a person may be absent for up to 180 days for any reason consistent with Alaska residency.<sup>3</sup> Second, a person may be absent for any length of time during the qualifying year while the person is “serving on active duty as a member of the armed forces of the United States . . .”<sup>4</sup>

At a formal hearing, the person who has requested the hearing has the burden of proving that the division’s determinations with regard to factual issues were in error.<sup>5</sup> There are, however, no factual issues in dispute in this case. The division agrees that Mr. W. maintained his Alaska residency during his absence, and the parties agree about the facts regarding that absence. The only issue is whether that absence disqualified Mr. W. for a 2010 PFD.

Because Mr. W. was absent from Alaska for more than 180 days in 2009, the allowable absence for general reasons available to all residents does not apply to this case. As a civilian employee of the Department of Defense, Mr. W. serves the nation’s defense interests and performs many duties similar to those served by some active-duty members of the military. But the law is clear that this narrow exception to the rule requiring physical presence in Alaska as a requirement of eligibility is only available to active-duty members of the armed forces. As a civilian employee, Mr. W. does not fall within the definition of those covered by this exception to the disqualification of those absent more than 180 days in the qualifying year. An absence of more than 180 days as a civilian Department of Defense employee in a war-zone doing hazardous duty members of the military is not one of the other listed exceptions and is therefore disqualifying under the eligibility rules for the 2010 PFD.

During the formal hearing, Mr. W. was not focused so much on arguing that the division was incorrect in its interpretation of the PFD eligibility laws, as he was in explaining his position

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<sup>1</sup> Recording of Hearing-Testimony of Ms. & Mr. W. & Exhibits 1- 9

<sup>2</sup> AS 43.23.005(a)(6).

<sup>3</sup> AS 43.23.008(a)(16)(A).

<sup>4</sup> AS 43.23.008(a)(3).

<sup>5</sup> 15 AAC 05.030

that if this interpretation was correct that the law should be changed. Mr. W. pointed out other allowable absence reasons that are arguably less deserving than serving the country as a civilian government employee in the war on terror on military orders in a hostile war zone along side active duty personnel. Mr. W. also pointed out that Alaska has had years since the war on terror began to amend the PFD eligibility rules to account for the reality that active duty military personnel are not the only government employees who put themselves at risk by serving in war zones in this conflict.

The division must enforce the law as written, and it is clear that it did so in this case. Only the legislature, which set these absence rules out in statute, can change those rules by enacting new legislation.

#### **IV. Conclusion**

Mr. W. was absent from Alaska during 2009 for reasons that are not specifically allowed as exceptions to the rule requiring applicants to have been physically present in Alaska all through the qualifying year. The division was correctly applying the law when it made the decision to deny his application for 2010 dividends.

#### **V. Order**

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of D. C. W. for a 2010 permanent fund dividend be AFFIRMED.

DATED this 17th day of November, 2010.

By: Signed  
Mark T. Handley  
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 21<sup>st</sup> day of December, 2010.

By: Signed  
Signature  
Mark T. Handley  
Name  
Administrative Law Judge  
Title

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