

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

In the Matter of:)	
)	
J. S.)	
)	OAH No. 10-0590 PFD
<u>2010 Permanent Fund Dividend</u>)	Agency No. 2010-022-4001

DECISION

I. INTRODUCTION

J. S. applied for a 2010 Permanent Fund Dividend (PFD). His application was denied by the Permanent Fund Dividend Division (Division) because Mr. S. 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 2009, the qualifying year for a 2010 PFD. Mr. S. completed the informal appeal process and requested a formal hearing.

A hearing was held by telephone on December 16, 2010. Mr. S. represented himself. The Division was represented by PFD specialist Peter Scott. Because there is no discretion to allow for payment of a PFD under these circumstances, the Division's decision is upheld.

II. FACTS

There are no relevant facts in dispute. Mr. S. testified that he has served in the military for about 12 years, first as an enlisted member, and as an officer for the past 7 ½ years. He was appointed to the United States Military Academy at West Point, and has been mostly absent from Alaska since the spring of 1999. He has returned to Alaska as often as possible, but he has not been able to receive a transfer to Alaska.

Mr. S. is now married, and his wife has also come to Alaska with him on two occasions. She loves Alaska, and Mr. S. testified convincingly as to their intent to return to Alaska when he completes his military service.

Mr. S. completed most of his K-12 education in Alaska, and wishes to remain a resident. He was sent by Alaska to serve his country, and is disappointed that Alaska has not created an exception to the physical presence requirements for PFD eligibility that recognizes the requirements of his military service.

Mr. S. did testify that he has been absent from Alaska for more than 180 days in 2009 as well as for each of the prior ten dividend years.

III. DISCUSSION

There is no dispute here that Mr. S. is and has been a resident of Alaska at least through the date of his PFD application.¹ 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.² Active duty military service is one of the listed allowable absences.³ This allowance is not unlimited, however. The legislature has adopted a ten-year rule applicable to most long term absences, including military absences.

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.^[4]

During the hearing, Mr. S. questioned the legislature's intent in adopting this rule. He wondered why the only service to the state that is recognized as an exception to this rule relates to service in Congress and not military service.

This statute was adopted as part of HB 2 during the second session of the 20th Legislature.⁵ The undersigned ALJ has not been able to find any legislative history directly discussing the intent of the 10 year rule.⁶ 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 to Alaska and those who do not. Ultimately, the legislature adopted a bright line rule that does not allow for an exception for military service. 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

¹ Alaska Statute AS 43.23.005(a)(2).

² AS 43.23.005(a)(6).

³ AS 43.23.008(a)(3).

⁴ 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.

⁵ Chap 44 SLA 98.

⁶ 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.

resident.⁷ This presumption is difficult to overcome, but it is not irrefutable.⁸ The legislature could have adopted a similar presumption for the 10 year rule which would have allowed applicants like Mr. S. 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.⁹

IV. CONCLUSION

Mr. S. 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 2009. The law does not allow for the receipt of a PFD in this situation. The Division's denial of Mr. S.'s application is affirmed.

DATED this 17th day of December, 2010.

By: Signed _____
Jeffrey A. Friedman
Administrative Law Judge

⁷ Alaska Regulation 15 AAC 23.163(g) & (h).

⁸ See, e.g., *In the Matter of R.T. and Child C.T.*, OAH Case No. 05-0409 PFD.

⁹ Left undecided by this ruling is whether Mr. S. will be eligible for a 2011 PFD. A literal reading of AS 43.23.008(c) suggests that he might be eligible precisely because he is not eligible for the 2010 PFD and, therefore, will not have been eligible for the "immediately preceding 10 dividends." Whether this literal interpretation of the statute is correct is not at issue in this case. See also 15 AAC 23.163(k).

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 14th day of January, 2011.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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