

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

In the Matter of:	)	
	)	
N. W.	)	
	)	OAH No. 10-0612 PFD
<u>2010 Permanent Fund Dividend</u>	)	Agency No. 2010-041-8345

**DECISION**

**I. INTRODUCTION**

N. W. applied for a 2010 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 2009, the qualifying year for a 2010 PFD. Mr. W. appealed that decision.

A hearing was held on February 9, 2011. The Division was represented by PFD Specialist Peter Scott. Mr. W. represented himself, and appeared in person. 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. W. was a resident of Alaska when he accepted an appointment to the U.S. Military Academy at West Point in 1999. He was absent from Alaska for more than 180 days in 1999, and in each of the successive years through 2009. During that time he maintained his Alaska residency while serving in the Army at a variety of locations.

Mr. W. was finally able to be stationed in Alaska, and returned in December of 2008. He was redeployed overseas in February of 2009 and did not return with his unit until February of 2010.

**III. DISCUSSION**

There is no evidence that Mr. W. has not been a resident of Alaska at least through the date of his PFD application.<sup>1</sup> The question in this case is whether he meets other requirements for receipt of a PFD. Among those other requirements, one must be physically present in Alaska

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<sup>1</sup> Alaska Statute AS 43.23.005(a)(2).

during the entire qualifying year or absent for one of the allowable reasons defined by state statute.<sup>2</sup> Active duty military service is one of the listed allowable absences.<sup>3</sup> 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.<sup>[4]</sup>

Mr. W. first points out that he did not receive a PFD in 2006 because he did not file an application.<sup>5</sup> One of the requirements for PFD eligibility is filing an application,<sup>6</sup> so strictly speaking Mr. W. was not eligible in 2006, and therefore has not been eligible in each of the prior ten qualifying years.

The Division argues that the intent of AS 43.23.008(c) was to focus on an individual's absence from the state rather than whether a person has submitted an application in each of the prior qualifying years. Otherwise, a person could avoid the intent of this law by failing to apply once every ten years, and remain eligible for a PFD for many years more than the legislature intended.

AS 43.23.008(c) was adopted as part of House Bill 2 during the second session of the 20<sup>th</sup> Legislature.<sup>7</sup> In transmitting that bill to the Governor, Representatives Kott and Mulder stated: "Individuals who are out of state on allowable absences will be forced to return to the state after ten years of absence or else lose Alaska residency."<sup>8</sup> The Attorney General also interpreted this provision: "The measure also would provide that an individual who is absent for periods in

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

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

<sup>4</sup> 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.

<sup>5</sup> Exhibit 3, page 1.

<sup>6</sup> AS 43.23.005(a)(1).

<sup>7</sup> Chap 44 SLA 98.

<sup>8</sup> Exhibit 9, page 2 (Letter to Governor Knowles transmitting HB 2).

excess of 180 days in each of the 10 years preceding the current dividend year is only eligible if an absence in the qualifying year for the PFD being applied for is 180 days or less.”<sup>9</sup>

Alaska courts interpret statutes based on reason, practicality, and common sense, while taking into account the plain meaning of the words used, the purpose of the law, and the intent of the drafters.<sup>10</sup> Even non-ambiguous language will not be construed in a way that is “plainly unreasonable in light of [the statute’s] intent.”<sup>11</sup>

Based on the language of the statute as well as the letters explaining that statute, the focus of this provision was on whether the applicant was absent from the state, rather than on whether the applicant actually applied to receive a PFD in each of the prior ten years. Common sense and reason suggest that the legislature did not intend to create a rule that would say one who was absent from the state for many years would only be ineligible for a PFD once every ten years. Yet, if a strict interpretation of the term “eligible” is applied, that would be the result. Having lost eligibility for one year, an applicant would no longer have been “eligible” for each of the preceding ten qualifying years and would thus become eligible again for ten more years.

The Division also argued that it addressed any potential ambiguity with a regulation:

For the purposes of AS 42.23.008(c), an individual is not considered otherwise eligible if the individual was absent from the state for more than 180 days in each of the preceding 10 qualifying years.<sup>[12]</sup>

The Division argued that this regulation restates the intent of AS 42.23.008(c) by clarifying that an applicant is not eligible for a PFD if he or she has been absent for more than 180 days in each of the relevant qualifying years regardless of whether the applicant actually applied for a PFD each year. While this regulation is awkwardly worded, the best interpretation is the one advanced by the Division. Mr. W. remains ineligible for a 2010 PFD even though he did not apply for a 2006 PFD.

Mr. W.’ next argument is that this statute was not intended to preclude someone in his situation from receiving a PFD. He actually returned to Alaska after 8 years and 11 months, when he was assigned a duty station in Anchorage. According to Mr. W., he met the intent of

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<sup>9</sup> Exhibit 10, page 3 (Letter to Governor Knowles from Attorney General). Other legislative history does not provide additional insight. 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 Committee February 9, 1998; and Senate Rules Committee April 14, 1998.

<sup>10</sup> *Young v. Embley*, 143 P.3d 936, 939 (Alaska 2006).

<sup>11</sup> *Progressive Insurance Co. v. Simmons*, 953 P.2d 410, 517 (Alaska 1998).

<sup>12</sup> 15 AAC 23.163(k).

the legislature because he did come back to the state, and he should not be penalized simply because he was redeployed shortly thereafter.

Generally, if a resident is absent from the state for more than 180 days in a qualifying year, he or she is not eligible to receive a PFD.<sup>13</sup> The legislature has recognized that Alaskans who are serving in the military must be physically absent from Alaska for long periods of time, and has created an exception to the general rule for members of the military and their families.<sup>14</sup> Even with this exception, however, a resident must still return to Alaska for at least 72 consecutive hours every two years.<sup>15</sup> In addition, one who has been absent for more than five years must present additional proof of his or her intent to return to Alaska in order to show that he or she remains an Alaska resident.<sup>16</sup> The ten year rule further limits the eligibility of residents with extended absences.

As discussed above, it was the intent of the legislature that applicants actually return to Alaska after ten years in order to remain eligible for a PFD. In addition, the legislature specifically stated the length of time that one must be in Alaska in order to avoid application of this rule: The applicant “is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year.”<sup>17</sup> The question is not whether the applicant intended to return for a longer period of time, but whether he or she actually did return for that length of time.

Mr. W. intended to return to Alaska for an extended period of time, but because of his military obligation he was still absent for more than 180 days during 2009. His position is not significantly different than other service members who have attempted to return to Alaska but have not been able to do so.<sup>18</sup> Because his absence in 2009 was for more than 180 days, he is not eligible to receive a 2010 PFD.

#### **IV. CONCLUSION**

It is undisputed that Mr. W. was absent from Alaska for more than 180 days during 2009, and that he was also absent from the state for more than 180 days in each of the preceding ten

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<sup>13</sup> AS 43.23.008(a)(17).

<sup>14</sup> AS 43.23.008(a)(3).

<sup>15</sup> AS 43.23.005(a)(4).

<sup>16</sup> 15 AAC 23.163(f) – (h).

<sup>17</sup> AS 43.23.008(c).

<sup>18</sup> *E.g. In re B.A.R.*, OAH No. 10-0020-PFD (Alaska Dept of Revenue 2010); *In re A.J.W.*, OAH No. 10-0042-PFD (Alaska Dept of Revenue 2010).

qualifying years. Accordingly, pursuant to AS 43.23.008(c), he is not eligible to receive a 2010 PFD.<sup>19</sup>

Dated this 11<sup>th</sup> day of February, 2011.

Signed

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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 18<sup>th</sup> day of March, 2011.

By: Signed  
\_\_\_\_\_  
Signature  
Jerry Burnett  
\_\_\_\_\_  
Name  
Deputy Commissioner  
\_\_\_\_\_  
Title

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<sup>19</sup> Nothing in the existing record establishes that Mr. W. is not still a resident and eligible for future PFDs if he meets the eligibility requirements.