

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

In the Matter of:)	
)	
D. C. S.)	
)	OAH No. 11-0103-PFD
<u>2010 Permanent Fund Dividend</u>)	Agency No. 2010-063-7739

DECISION

I. Introduction

D. C. S. timely applied for a 2010 permanent fund dividend (PFD). This is the first application Mr. S. has filed since his 2003 application was denied. He has been absent from Alaska serving in the military for 23 years. During his military service he rarely returned to Alaska. For nine years, from 1986 through 1995, he did not return to Alaska. Since 1995 he has returned to Alaska five times for a total of 101 days out of a possible 4,847 days.¹ The Permanent Fund Dividend Division considered Mr. S.'s application and concluded that he had severed his residency for PFD purposes some time prior to his 2010 application. At Mr. S.'s request, a formal telephonic hearing was held on April 11, 2011. The division's denial is affirmed because Mr. S. has not submitted evidence sufficient to establish that it is more likely than not that while absent serving in the military he remained an Alaska resident.

II. Facts

The facts of this case are not in dispute, the sole issue being their legal significance. Unless otherwise attributed, the facts set out below are based on testimony at the hearing and the exhibits in the record.

Mr. S. was born in Alaska in 1964 and remained in Alaska until enlisting in the Navy in March 1986. Upon enlistment, the Navy sent Mr. S. out of state to boot camp and training. He was trained as a Submariner Fire Control Technician. As enlisted personnel, Mr. S.'s did not make much money in his early years of service while he was also starting a family. It is for lack of funds and his daughter's heart surgery that Mr. S. states he did not return to Alaska more often. His time in Alaska is reflected in the following chart:

¹ December 15, 1995 through May 28, 2009.

Arrive	Leave	# of Days in AK
	March 23, 1985 (enlisted in the Navy)	
December 15, 1995	December 20, 1995	5
November 7, 1997	November 21, 1997	20
June 7, 2001	June 27, 2001	20
February 20, 2006	March 24, 2006	32 (father's funeral)
December 20, 2006	January 20, 2007	31
May 28, 2009 (Retires to Alaska)		

Mr. S. is a submariner specialist and can only be assigned to submarines. There is no submarine base in Alaska so he could never request a duty assignment to Alaska. He has always intended to return to Alaska. His Leave and Earnings Statement identifies Alaska as his home state. Mr. S. testified that he retained his Alaska driver's license and vehicle registration until a state he was stationed in required it be changed. He now has an Alaska driver's license and is registered to vote in Alaska. Mr. S. has some family in Alaska and he is now seeking full time employment. As further evidence of his intent to return Mr. S. explained that knowing he would be returning to Alaska, he sent his sons ahead so they could start the 2008 school year in Alaska.

III. Discussion

A. Applicable Law

A person requesting a formal hearing has the burden of proving that the division's decision was in error.² The Department of Revenue ("Department") supports an individual's choice to serve in the military and does not believe a person should be forced to choose between service to their country and maintaining their Alaska residency for PFD eligibility purposes. The applicable statutes and the Department's regulations addressing physical presence in Alaska balance an individual's choice to serve with objective indicia of residency.

An otherwise eligible individual remains eligible for a PFD if that person was absent serving on active duty as a member of the armed forces or accompanying that person as a spouse or dependent;³ however, to qualify for a PFD, such a person must be an Alaska resident throughout the qualifying year and at the date of application.⁴ A person establishes residency in

² 15 AAC 05.030(h).

³ AS 43.23.008(a)(3).

⁴ AS 43.23.005(a)(2), (3).

Alaska by being physically present in the state with the intent to remain indefinitely and to make a home in the state.⁵

Most allowable absences are not without limits. The law imposes presumptions about an individual's intent to return to Alaska. The law also requires that, when determining whether an individual has maintained the requisite commitment to return to Alaska at all times during an absence of many years, intent is measured by certain objective criteria rather than a simple assessment of the credibility of the individual asserting that he consistently maintained that commitment.

By law, there is a presumption that a person who has been allowably absent for more than five years is not an Alaska resident anymore.⁶ It is rare that a PFD applicant who spends the majority each year outside for more than five consecutive years is able to overcome the presumption that he or she has not maintained the intent to return to Alaska at all times during his or her absence. The law makes it especially difficult to overcome the presumption if the individual "has not been physically present in Alaska for at least 30 cumulative days during the past five years."⁷

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

B. Mr. S. Must Reestablish Residency for PFD Purposes

It is undisputed that prior to serving in the Navy Mr. S. was an Alaska resident for purposes of the PFD. However, because Mr. S. was absent from the state for more than five consecutive years (1986 – 1995) it is presumed that during that time Mr. S. no longer had the

⁵ AS 01.10.055(a).

⁶ 15 AAC 23.163(f).

⁷ 15 AAC 23.163(h)(2).

intent to return to Alaska and remain indefinitely.⁸ Mr. S. left Alaska in 1986. He applied for and received a 1986 and 1987 PFD. His 1988, 89, and 90 applications were denied.⁹ Mr. S. did not apply again until 2002 and again his application was denied.¹⁰ Neither party explained the reason for those denials. In 2003 his application was denied because he did not respond to the division's request for additional information.¹¹ He did not apply again until 2010. The regulation at 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. Mr. S. could argue that he meets the presumption because he was physically present more than 30 days in the five years preceding his May 2009 return; however, the five-year period during which Mr. S. needed to make 30 days of visits to avoid the presumptive five year rule ran from March 1986 through March 1991.

During this time period Mr. S. did not return to Alaska for any visits. He testified that his failure to return was the result of a lack of funds and his daughter's open heart surgery in 1991. Mr. S.'s reasons for not returning were not "unavoidable." Unavoidable circumstances have been found to exist where the ability to return to Alaska was beyond an applicant's control such as deployment overseas with no opportunity for leave.¹²

An "unavoidable circumstance" is something more than having to choose between two options; it is a force precluding an applicant from even having the option to choose. Such was the case in *In re I. H. et al.*, Caseload No. 020683 (Alaska Department of Revenue 2003). In *In re I. H. et al.* the applicants were a military family who had lived in Alaska until Mr. H. was stationed in Europe. During the time in question they returned to Alaska for one seven day visit. Aside from the expense and hassle of traveling with four young children to and from Europe, Mr. H. argued convincingly that his military duty prevented him from returning. He established that he had unique skills in an undermanned area of the Navy and he was only rarely able to take leave. He demonstrated that in one year he took three days of leave, lost 25 days of unused leave, cashed in 45 days of accumulated leave and carried the maximum allowable 60 days forward to the next year. His leave requests were denied five times; he had been advised that he

⁸ A check of the regulations in effect during that time period reveal the applicable regulation contained a similar "five year rule."

⁹ Exh. 1 at 5.

¹⁰ *Id.*

¹¹ Exhibit 9 at 6. The record does not indicate why Mr. S.'s application was flagged but it is reasonable to conclude that the application was flagged because Mr. S. had been absent for the entire qualifying year.

would not be granted more than a 14 day block of leave, if leave was possible. The Administrative Law Judge found that Mr. H. had demonstrated that the requirements of his service prevented him from taking even a normal amount of leave.

In *In re S.H. et al.*, Caseload No. 030093 (Alaska Dep't of Revenue 2003), the applicant, an active duty member of the Air Force, and his wife had lived in Alaska for six years until he was assigned to a duty station outside of Alaska. During their absence, he and his wife maintained their Alaska drivers' licenses, remained registered to vote and contributed to the University of Alaska college savings plans for their daughters. Mr. H. was a registered professional who only maintained his license in one state, Alaska. He listed Alaska as his state of legal residence on his Leave and Earnings Statement, and kept Alaska bases at the top choices on his dream sheet. During a period of 5 years' absence from Alaska, the family had returned to Alaska for a total of 28 days. In upholding the division's denial of the family's applications, the Administrative Law Judge reasoned:

Mr. H. has shown that his Air Force duty has made it "impractical" to return more often, and he has shown that returning to Alaska is extremely expensive and inconvenient. He has not shown that unavoidable circumstances prevented him from making more frequent returns. Only that to do so would be difficult and expensive. . . While [Mr. H.] did identify a number of factors that do suggest continuing Alaska residency, the division was also correct to discount these factors somewhat under subsection (h)(1) because of the infrequency and short duration of Mr. H's returns to Alaska.¹³

In a more recent case, *In re K.P.*, OAH No. 09-0274-PFD (November 17, 2009), K. P. was preparing to retire from the military and would be returning to Alaska. During the relevant five year period she had returned to Alaska for a total of 6 days. K. P. was registered to vote in Alaska; her vehicle was registered in Alaska; she had an Alaska driver's license; and she listed Alaska as her legal state of residence on her Leave and Earnings Statement. She also owned two properties in Alaska and had family in Alaska. K. P.'s reasons for not staying longer or visiting Alaska more often focused on the expense, the difficulty of coordinating leave with family obligations and children's school schedules. K. P.'s situation made it impractical to return to Alaska but she did not shown that unavoidable consequences prevented her or other family members from returning to Alaska for at least 30 cumulative days in five consecutive years.

¹² *In re V. V. et al.*, OAH No. 07-0104-PFD (2007).

¹³ *In re S. H. et al.*, Caseload No. 030093 (Alaska Dep't of Revenue 2003).

Mr. S.'s circumstances are less favorable than those presented in *In re S. H. et al.* or *In re K.P.* Mr. S. did not return to Alaska for nine years. He owned no real property in Alaska. He had driver's licenses and registered car's in other states. His reasons for not visiting Alaska more focused on the expense and his daughter's 1991 surgery. Mr. S.'s situation made it impractical to return to Alaska but he has not shown that unavoidable consequences prevented him from returning to Alaska for at least 30 cumulative days during the period from 1986 through 1991. Therefore, the five year presumption applies.

The department's regulations provide a list of seven factors that it will consider, where applicable, in determining whether the applicant has rebutted the presumption.¹⁴ The division argues that by Mr. S.'s failure to appeal is prior denials and failure to participate in the PFD program for several years is evidence sufficient to uphold the division's determination of denial for lack of residency.¹⁵ However, the department has not included these two items as factors to be weighed when considering whether an applicant has rebutted the five year presumption.¹⁶

The factors are reviewed below:

1. *Length of absence compared to time in Alaska before departing.* These two periods are almost equal. Mr. S. left Alaska when he was 24 and he returned nine years later. The length of his time spent in Alaska is longer than his total years absent, 23.

2. *Frequency and duration of return trips to Alaska.* Mr. S. returned to Alaska infrequently over the 23 years he has been absent. During the first nine years he had no return trips to Alaska. However, after 1995 his trips were sporadic but his trips appeared to be the result of a desire to spend time in Alaska rather than to fulfill an eligibility requirement.¹⁷

3. *Whether intent to return is conditioned on future events beyond the individual's control, such as economics or finding a job in Alaska.* This factor weighs in Mr. S.'s favor as he has returned to Alaska and is seeking employment.

¹⁴ 15 AAC 23.163(g).

¹⁵ Division Position Statement at 3.

¹⁶ There are many reasons a person may decide not to appeal a denial or not to apply for a PFD that have nothing to do with whether the individual maintains an intent to return to Alaska to remain indefinitely.

¹⁷ *C.f., In re K.P., supra* at 5 (timing and length of return trips indicated that they were not voluntary and the result of a desire to spend time in Alaska, but rather intended to satisfy another eligibility requirement: being present in state 72 hours every two years.) AS 43.23.005(a)(4) requires that an applicant have been physically present in Alaska for at least 72 consecutive hours at some time during the prior two years before the current dividend year.

4. *Any ties the individual has established outside Alaska (homes, taxes, voter registration, etc.).* Mr. S. owned no real property in Alaska or elsewhere. He did not register to vote in another state. He paid no income taxes because he listed Alaska as his home state on his Leave and Earnings Statement. He testified that in some states he was required to obtain a driver's license and vehicle registration of that state.

5. *Priority the individual gave Alaska in employment assignment preference.* Based on Mr. S.'s testimony, his explanation appears reasonable. His failure to request an assignment to Alaska is given little if any weight.

6. *Whether the individual chose a career path that does not allow return to Alaska.* 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.¹⁸

7. *Ties to Alaska such as real property, voter registration, etc.* While he was absent, Mr. S. owned no real property in Alaska. His military records show Alaska as his state of legal residence. He is registered to vote in Alaska. Mr. S. has not established significant ties with any other state or country. Mr. S. did maintain paper ties to Alaska.

Most of the factors are neutral. The Alaska Supreme Court has stated that "paper ties" to Alaska, *e.g.*, Alaska motor vehicle registration, Alaska voter registration, and Alaska driver's license, are entitled to some weight, but they are not conclusive evidence on the issue of intent to return to Alaska during a long absence. *State, Dept. of Revenue v. Wilder*, 929 P.2d 1280, 1282 (Alaska 1997). Most damaging to Mr. S.'s appeal is that he never returned to Alaska for nine years and once he did return his physical presence was sporadic. His failure to return was not due to unavoidable circumstances. The Department's regulations direct that when considering whether an individual has rebutted the presumption it will give greater weight to the claim of an applicant "who makes frequent voluntary return trips to Alaska during the period of the individual's absence than to the claim of an individual who does not."¹⁹ Taking all of these

¹⁸ 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).*

¹⁹ 15 AAC 23.163(h)(1).

factors into account Mr. S. has not rebutted the regulatory presumption that an individual does not have the intent to return to Alaska and remain indefinitely created by an absence exceeding five years.

Therefore, to be eligible for a 2010 PFD Mr. S. would need to reestablish residency prior to January 1, 2009. “An individual may not become a resident while absent from Alaska”²⁰ Mr. S.’s most recent absence commenced January 20, 2007 and ended May 28, 2009. Therefore, he could not establish residency prior to January 1, 2009.

IV. Conclusion

Mr. S. has not rebutted the presumption that an individual whose allowable absence totals more than five years no longer has the intent to return to Alaska and remain indefinitely. Therefore the division correctly denied Mr. S.’s application for a 2010 PFD.

DATED this 15th day of April, 2011.

By: Signed
Rebecca L. Pauli
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 13th day of May, 2011.

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

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

²⁰ 15 AAC 23.143(b)