

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

In the Matter of:	)	
	)	
B R, and	)	
A, M	)	
& E R, (minor children)	)	
	)	OAH No. 11-0222-PFD
<u>2010 Permanent Fund Dividend</u>	)	Agency No. 2010-059-9217

**DECISION**

**I. INTRODUCTION**

Lieutenant Colonel B R applied for a 2010 Permanent Fund Dividend (PFD) for himself and his three children. Lt. Col. R's application was denied by the Permanent Fund Dividend Division (Division) because he had been absent from the state for more than ten years. The Division denied the applications of his minor children because they did not have an eligible sponsor. Lt. Col. R went through the informal appeal process, and then requested a formal hearing.

A hearing was held by telephone on July 26, 2011. Lt. Col. R represented himself at the hearing. The Division was represented by PFD Specialist Bethany Chase. Because Lt. Col. R was absent from Alaska for more than 180 days during each of the preceding 10 years, and because he was absent for more than 180 days during the qualifying year for the 2010 PFD, he is not eligible for the 2010 PFD. His minor children are not eligible because they did not have an eligible sponsor.<sup>1</sup>

**II. FACTS**

This is the second time Lt. Col. R has appealed the denial of his application and his applications on behalf of his children. A formal hearing was also held in his prior appeal, and a decision was issued affirming the denial of his applications.<sup>2</sup> The facts in this case are essentially the same as in his prior case, and are not in dispute.

Lt. Col. R is a life-long Alaska resident. After graduating from high school, he attended the United States Naval Academy. Since graduating from the Naval Academy, Lt. Col. R has served in the United States Marine Corps. He has

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<sup>1</sup> The Division filed a motion for summary adjudication prior to the hearing. Although summary adjudication might have been appropriate in this matter because there were no facts in dispute, the Division's motion contained no citations to or discussion of relevant facts or legal authority.

<sup>2</sup> *In re B.A.R.*, OAH No. 10-0020-PFD (Dept of Revenue 2010).

returned to Alaska often during his military service. He maintains significant contacts with Alaska including voting in Alaska and owning real estate in the state. Despite having been stationed in six different states since his enlistment, Lt. Col. R has never taken any step to become a resident of any other state.<sup>131</sup>

The prior appeal held that Lt. Col. R continued to be a resident of Alaska.<sup>4</sup> Based on the evidence submitted with his application for a 2010 PFD, Lt. Col. R has remained a resident of Alaska since the prior decision was issued. However, Lt. Col. R was unable to return to Alaska during 2009.<sup>5</sup>

### III. DISCUSSION

Eligibility to receive a PFD depends on several different factors. Among other requirements, one must be physically present in Alaska during the entire qualifying year, or be absent for an allowable reason.<sup>6</sup> For most of his military career, Lt. Col. R was allowably absent as an active duty member of the U.S. armed forces.<sup>7</sup> His children qualified as minor dependents accompanying an active duty member of the armed forces.<sup>8</sup> For the 2009 qualifying year, his absence was not qualified because of another statutory provision.

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 (a)(10) of this section.<sup>191</sup>

Lt. Col. R did not receive a 2009 PFD because he had been absent from the state for more than 180 days in each of the prior ten years as well as for 180 days during 2008, which was the qualifying year for the 2009 PFD.<sup>10</sup> The decision denying his application was upheld by the Superior Court.<sup>11</sup>

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<sup>3</sup> B.A.R., footnotes omitted.

<sup>4</sup> B.A.R., page 2.

<sup>5</sup> Exhibit 1, page 14.

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

<sup>7</sup> AS 43.23.008(a)(3).

<sup>8</sup> *Id.*

<sup>9</sup> AS 43.23.008(c) (a)(9) and (a)(10) create an unlimited allowable absence for members of Congress and their staff. (a)(13) creates an allowable absence for a spouse or dependants of a person accompanying other eligible applicants.

<sup>10</sup> B.A.R., page 4.

<sup>11</sup> Exhibit 7, Superior Court order dated May 13, 2011.

In this appeal, Lt. Col. R raises the same arguments raised in his prior appeal. Those issues are resolved against him here for the same reasons stated in the prior appeal, as well as the reasons stated in the Superior Court decision.

Lt. Col. R also raised an additional argument in this appeal, and the primary focus of his appeal is on that additional argument. AS 43.23.008(c) specifically states that it applies to an individual “who has been eligible for the immediately preceding 10 dividends . . .” Lt. Col. R was not eligible for the 2009 PFD.<sup>12</sup> The plain meaning of the words used in this statute suggest that it does not apply to Lt. Col. R because he has not been eligible for the immediately preceding 10 dividends.

This issue was addressed in a prior administrative hearing, *In re N.W.*, OAH No. 10-0612-PFD (Dept. of Revenue 2011). In *N.W.*, the applicant argued that he had not applied for a prior year PFD. Because he had not applied, he was not eligible for a PFD that year and, therefore, had not been eligible for a PFD in each of the preceding ten years. The Division argued that the focus of AS 43.23.008(c) was on the individual’s absence, and not on whether he or she had submitted an application in each year.

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>13</sup> Even non-ambiguous language will not be construed in a way that is “plainly unreasonable in light of [the statute’s] intent.”<sup>14</sup> *In re N.W.* relied on legislative history concerning the intent of this provision to hold that Mr. W. was not eligible due to his absence from the state regardless of the fact that he had not applied for one of the prior PFDs during the ten year absence period.<sup>15</sup>

The *N.W.* decision relied in part on a letter from Representative Kott stating his view of the impact of this statute.<sup>16</sup> Lt. Col. R noted during this hearing that Representative Kott testified during a Senate Finance Committee hearing against this provision.<sup>17</sup> Representative Kott was a sponsor of House Bill 2. That he opposed the amendment to his bill adding subsection (c) to this statute does not mean he failed to understand the affect of this language.

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<sup>12</sup> *B.A.R.*, page 4.

<sup>13</sup> *Young v. Embley*, 143 P.3d 936, 939 (Alaska 2006).

<sup>14</sup> *Progressive Insurance Co. v. Simmons*, 953 P.2d 410, 517 (Alaska 1998).

<sup>15</sup> *N.W.*, page 3.

<sup>16</sup> *N.W.*, page 2.

<sup>17</sup> Senate Finance Committee Minutes, February 9, 1998, Tape 24, Side B.

Indeed, he may have opposed it precisely because he understood its impact on military personnel such as Lt. Col. R.

The reasoning in *N.W.* applies equally here. It was the intent of the legislature in 1998 to create a bright line rule. After ten years of absence from the state for more than 180 days each year, a person needs to return to Alaska for an extended period of time during the qualifying year in order to be eligible for a PFD.<sup>18</sup> To interpret the statute otherwise would be unreasonable in light of the legislature's intent.

In denying Lt. Col. R' application, the Division also relied on a clarifying 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>[19]</sup>

This regulation is ambiguous. It states that an individual is not "considered otherwise eligible" for the purposes of AS 43.23.008(c) if they have been absent for the ten preceding years. But AS 43.23.008(c) only applies if the individual is otherwise eligible. Read literally, this regulation would essentially repeal AS 43.23.008(c). Instead, this regulation should be read to focus the eligibility analysis on the applicant's absence, and not on whether the applicant actually received a PFD in each of the preceding ten years.<sup>20</sup>

#### **IV. CONCLUSION**

Although he remains an Alaska resident, Lt. Col. R is not eligible for a 2010 PFD because he has been absent from the state for more than 180 days in each of the ten previous qualifying years and remained absent for more than 180 days in 2009, the qualifying year for a 2010 PFD. His children are not eligible for a 2010 PFD because they do not have an eligible sponsor.

Dated this 29<sup>th</sup> day of July, 2011.

*Signed*  
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Jeffrey A. Friedman  
Administrative Law Judge

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<sup>18</sup> The applicant would need to be present for 185 days, or 186 days in a leap year, in order not to be absent for more than 180 days in the qualifying year.

<sup>19</sup> 15 AAC 23.163(k).

<sup>20</sup> Deleting the words "considered otherwise" from this regulation would add clarity.

## 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 1<sup>st</sup> day of September, 2011.

By: Signed  
Signature  
Jerry Burnett  
Name  
Deputy Commissioner  
Title

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