

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

In the Matter of:)	
)	
S D)	
)	OAH No. 11-0294-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-033-4224

DECISION

I. INTRODUCTION

S D applied for a 2011 Permanent Fund Dividend (PFD). His application was denied by the Permanent Fund Dividend Division (Division) because he had not been physically present in Alaska for at least 72 hours during the prior two years. Mr. D completed the informal appeal process and then requested a formal hearing.

A formal hearing by telephone was held on August 30, 2011. Mr. D represented himself. The Division was represented by PFD specialist Peter Scott. The record was held open until September 9, 2011 to allow the parties to submit additional information. Mr. D submitted phone records which have been admitted as Exhibit 11.

Based on the evidence in the record, the Division's decision to deny Mr. D's application is upheld.

II. FACTS

Many of the relevant facts are not in dispute.¹ Mr. D has been absent from Alaska for several years while serving in the military. He injured his back during the first week of June in 2010.² He had been planning to return to Alaska in June, but was unable to do so because of this injury. He had surgery in September, and was off work for most of the time from the date of his injury through the end of 2010. He did return to Alaska in January of 2011 after his doctor gave him permission to fly.

It is undisputed that Mr. D was not present in Alaska for at least 72 hours during 2009 and 2010. Although serving in active duty, Mr. D did not receive hostile fire pay or imminent danger pay during 2010.

¹ Unless otherwise noted, factual findings are based on Mr. D's testimony.

² Exhibit 3, page 2.

III. DISCUSSION

Eligibility for a PFD is dependent on several factors, one of which is that the applicant must have been physically present in Alaska for at least 72 consecutive hours during the two years prior to the dividend year.³ This requirement may be waived in some circumstances by the Commissioner.⁴ The Commissioner has issued a waiver applicable to service members. To qualify for this waiver, the applicant must be able to show that he or she received imminent danger pay or hostile fire pay during 2010.⁵ Mr. D does not qualify for this waiver because he did not receive either imminent danger pay or hostile fire pay.

The 72 hour rule adopted by the legislature is a strict requirement, and there is very little discretion to waive that requirement. The Commissioner has exercised discretion and waived this requirement only for members of the military who received imminent danger pay or hostile fire pay.⁶ Mr. D does not meet this requirement. In some situations, the demands of military service will prevent other service members from returning for 72 hours, but that alone does not create a basis not to apply the 72 hour rule.⁷

Mr. D has asserted, however, that he was told by the Division that he did not have to return to Alaska for 72 hours if his medical condition prevented his return and he could submit medical records to establish that fact. He testified that he relied on that advice, and decided not to return. He further testified that, although it would have been very difficult and painful, he would have returned if he had known it was a necessary condition for receipt of a 2011 PFD.

The government may, in some circumstances, be estopped from acting contrary to a position it has previously taken. This doctrine is called estoppel and it applies when

1. The government asserts a position by word or conduct;
2. The private party reasonably relies on that statement or action;
3. The party suffers prejudice as a result; and
4. Estoppel serves the interest of justice.⁸

³ AS 43.23.005(a)(4).

⁴ AS 43.23.005(f).

⁵ Exhibit 7.

⁶ Exhibit 7.

⁷ *In re J.G.G.* OAH No. 09-0266-PFD (Dept of Revenue 2009)(Exhibit 9). *See also In re F.L.*, OAH No. 09-0171-PFD (Dept of Revenue 2009)(Exhibit 10) (inability to return due to medical condition).

⁸ *Hidden Heights Assisted Living, Inc. v. State*, 222 P.23d 258, 268 (Alaska 2009); *In re G.C.* OAH No. 09-0436-PFD, page 2 (Dept of Revenue 2010).

The central factual question in this matter is whether Mr. D was told prior to January 1, 2011, that he did not need to return to Alaska to remain eligible for a PFD.⁹ The Division has submitted telephone log notes that document conversations with Mr. D during 2011, after his PFD application was filed.¹⁰ Mr. D says that he also spoke with Division personnel several times prior to that. He does not have any phone records from before October of 2010 because he switched telephone carriers, but the records he does have show a ten minute phone call to the Division's Juneau office on November 8, 2010 and an eight minute phone call to the Anchorage office on December 23, 2010.¹¹

The Division has not submitted any telephone log notes from those two telephone calls, and it is not known whether the Division's standard practice is to create records of phone calls prior to the time an application has been filed. The advice he says he was given is clearly contrary to the actual eligibility requirements. While it is possible that he was in fact given incorrect advice, Mr. D has the burden of proof and must show that it is more likely true that he was given this advice. In this case, without additional evidence, it is equally possible that he misheard or misunderstood what he was told by the Division representative.¹² While his present belief as to what he was told is not questioned, Mr. D has not shown that it is more likely true than not true that he was in fact told he could remain eligible for a PFD without returning to Alaska for 72 hours.

IV. CONCLUSION

Because Mr. D did not return to Alaska for 72 consecutive hours in 2009 or 2010, he is not eligible to receive a 2011 PFD. He has not met his burden of proving that he was told by the Division that he did not need to return, so he cannot take advantage of the doctrine of equitable estoppel. The Division's determination that he is not eligible is **AFFIRMED**.

Dated this 15th day of September, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

⁹ He needed to return for 72 hours in 2010. He could not have relied on a statement on or after January 1, 2011 in deciding not to return to Alaska before that date.

¹⁰ Exhibit 1, page 5.

¹¹ The phone numbers listed on his billing records match the numbers listed as contact numbers on the Division's web site. This decision takes official notice of the information from this web site. If either party disputes this information they should raise this issue in their proposal for action. 2 AAC 64.300(a).

¹² An e-mail or other written communication from the Division showing the exact words used would have shown precisely what was said to Mr. D.

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 October, 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.]