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

In the Matter of:	)	
	)	
T & D G	)	
	)	OAH No. 11-0349-PFD
2011 Permanent Fund Dividends	)	Agency Nos. 2011-022-2373/2392

DECISION

I. Introduction

Lt. Col. T G has been allowably absent from Alaska for over five years as an active duty member of the armed forces. D G and their four children have been absent accompanying Lt. Col. G as dependents.[1] From January 2006 through December 31, 2010, Lt. Col. G returned to Alaska a total of 13 days. A person who does not return for at least 30 days in five years is generally presumed to no longer have the intent to return to Alaska to remain indefinitely.[2] For this reason the Permanent Fund Division denied the Gs' 2011 PFD applications. However, the inquiry is not a simple application of a mathematical formula. Rather, the inquiry is whether the Gs have brought forth plain and persuasive evidence sufficient to overcome the presumptions against residency at 15 AAC 23.163(f) and (h). The Gs have not met their burden. Accordingly, the decision of the division to deny T and D G their 2011 PFDs should be affirmed.

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 file.

Lt. Col. G is in the active duty military. His military service brought him and his family to Alaska on May 26, 2002, where they stayed until February 10, 2005 when he was transferred to North Carolina. While in Alaska, the Gs purchased a house. When they moved to North Carolina they purchased another house and rented out the Alaska house. Lt. Col. G testified that they have had offers to purchase the Alaska house but have turned them down because he plans to return to Alaska when he retires or when he can get reassigned.

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[1] Ms. G's and the four children's residency are piggybacked on Lt. Col. G's eligibility for a 2011 PFD. Therefore, if Lt. Col. G is eligible then the rest of the G family is also eligible. For this reason, the decision focuses on Lt. Col. G's eligibility.

[2] 15 AAC 23.163(h).

Lt. Col. G is a career military service member and to further his career he needed a command post. When one opened up in Germany, he put in for the assignment and was awarded a position as a commander of a tactical air control party. He has remained at this post except for the six months he was deployed to Afghanistan in 2010.

Since leaving, Lt. Col. G has returned to Alaska twice: once in 2006 for six days and once in 2008 for seven days. The family returned three times: twice with Lt. Col. G and once without him for 14 days in 2010. The family believed they had returned a total of 31 days over the course of five years; however, when the days are calculated as required by regulation, the family has only 27 days of physical presence in Alaska. The Gs have maintained paper ties with Alaska: including voter registration, vehicle registration, driver's license, and that he lists Alaska as his legal state of residence on his Leave and Earnings Statement. They have voted absentee in general elections but not for state or local elections.

When questioned regarding his ability to leave his post and visit Alaska, Lt. Col. G explained that as the commander he could have granted himself leave but he did not feel it was appropriate to do so. He also explained that the cost of travel, the coordination of travel with the children's schedules, and the need to visit relatives who lived in other states made returning to Alaska more difficult.

III. Discussion

Only eligible Alaska residents may receive a PFD. A person establishes residency in Alaska by being physically present in the state with the intent to remain indefinitely and to make a home in the state.[3] Once a resident of Alaska, a person remains a resident during an absence unless the person establishes residency elsewhere or is absent under circumstances that are inconsistent with the intent to remain indefinitely and make a home in Alaska. The legislature has identified certain absences that are consistent with the intent to remain in Alaska.[4] These are often referred to as "allowable absences." One such allowable absence is an absence from Alaska while on active duty as a member of the armed forces or accompanying that person as a spouse or dependent.[5]

However, an allowable absence is not without limits. The law imposes presumptions about an individual's intent to return to Alaska. If the intent is lost during an absence, PFD eligibility is also lost even if the absence might otherwise be allowable.

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3 AS 01.10.055(a).
4 AS 43.23.008.
5 AS 43.23.008(a)(3).

The Department has three regulations to guide decisions when determining the subjective intent of an individual who has been allowably absent for an extended period of time. The first provides that a person who is allowably absent for five years is presumed to no longer have the intent to return and make Alaska their home.[6] This presumption is rebuttable. The second regulation identifies several objective factors to consider when determining whether an individual has rebutted the five year presumption, and the third identifies a presumption within the five year presumption.[7] The third regulation provides that if an allowably absent person has not returned for a cumulative 30 days within five consecutive years, then as a general rule, that person is presumed no longer to be a resident for PFD purposes.

This 30 day guideline does not apply at all when the failure to return is due to unavoidable circumstances.[8] Unavoidable circumstances exist where the ability to return to Alaska was beyond an applicant's control such as deployment overseas with no opportunity for leave.[9]

Absent unavoidable circumstances, the 30-day presumption, contrary to the division's position in its informal appeal decision, still is not absolute.[10] Rather, it is an indicator of intent. As consistently expressed in all three regulations, the critical inquiry is whether the applicant has rebutted the presumptions by establishing "an intent at all times during the absence or absences to return to Alaska and remain indefinitely in Alaska."[11]

The applicant's burden is to rebut each presumption (the 30 day and the five year presumptions) by a preponderance of the evidence.[12] If the burden is viewed as a scale and the applicant had been unable to establish by a preponderance of the evidence that the unavoidable circumstances prevented a return for at least 30 days in five years, then the scale is tipped against a finding of residency and the applicant must present persuasive evidence that will not only bring the scale back in balance but tip it in favor of residency. This is a difficult task because the applicant

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6 15 AAC 23.163(f).

7 *In Re P. O. et. al.*, OAH No. 10-0444-PFD (Commissioner Adoption November 7, 2010) (Identifying the presumption within a presumption and noting the need for unambiguous evidence of intent).

8 15 AAC 23.163(h)(2).

9 *See e.g., In re V. V. et al.*, OAH No. 07-0104-PFD (2007).

10 Conversely, a person who has returned to Alaska for a cumulative 31 days in five years has not necessarily rebutted the five year presumption, although when viewing the evidence presented, the claim of an individual who makes frequent voluntary trips to Alaska will be given greater weight than one who does not.

The division's assertion that "an individual who returns to Alaska for fewer than 30 days in the five year period . . . *must* have unavoidable circumstances preventing their returning more often to be considered eligible…" is too restrictive and misapplies the regulation. Division Informal Appeal Decision, Exh. 10 at 1 (emphasis added).

11 15 AAC 23.163(f) ("When considering whether an individual who has been absent for more than five years has rebutted the presumption that the individual does not have the intent to return to Alaska and remain indefinitely…."); 15 AAC 23.163(g), (h).

12 2 AAC 64.290(e); 15 AAC 05.030(h).

starts out with the record strongly weighted against the applicant. It does not mean, however, that in every instance where a person has elected not to return for 30 days in five years the person is no longer a resident. If the person can bring enough evidence to outweigh the double presumption, so that a preponderance of all the evidence (including the evidence of the prolonged absence) shows an intent to return to Alaska and maintain a home indefinitely, residency can be preserved.[13]

There are seven factors to be considered when determining whether the applicant has objectively demonstrated the retention of residency throughout the five year absence.[14] The seven factors and their evidentiary weight under the facts presented are reviewed below:

1. Length of absence compared to time in Alaska before departing. Lt. Col. G was present in Alaska for just under three years before leaving. The length of the absence has exceeded the time spent in Alaska. This factor weighs against the Gs.

2. Frequency and duration of return trips to Alaska. Lt. Col. G has returned to Alaska a total of 13 days in over five years. The timing (every two years) and the duration of Lt. Col. G's visits (two days longer than the required three days) indicate that they could have been intended to satisfy another eligibility requirement, physical presence in state for 72 hours every two years rather than a voluntary trip because of a desire to spend time in Alaska.[15]

However, Lt. Col. G's unchallenged testimony is that his inability to return was self imposed due to the needs of the troops. When questioned regarding his ability to take leave, Lt. Col. G explained that because he was the individual who approved and denied leave, he would have denied his own leave. In this way his leave was denied and it could be said the failure to return was unavoidable. Regardless, had he taken leave it is unlikely that his cumulative days would total 30 because Ms. G, who did not have the same self imposed restrictions as Lt. Col. G, accumulated only 27 days of physical presence in Alaska. As indicated by Lt. Col. G, had they understood how the days were counted, they would have stayed longer. This indicates that their returns were intended to satisfy eligibility requirements, not because of an independent desire to return to Alaska. This factor weighs against the Gs.

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[13] The regulation creating the measure of thirty days in five years provides a kind of yardstick for measuring the likelihood that a person still intends to return to Alaska. It is to be given great weight, but it is not an absolute rule; the division will *generally* follow it. It is a rare case when an applicant will be able to present such overwhelming evidence of intent to return to Alaska that the general rule should not be followed. The rule helpfully provides a concrete solution to the problem of actually measuring something as ethereal as a person's probable subjective intent. *In re M. & A. R.*, OAH No. 06-0228-PFD (September 2006) at 3.

[14] 15 AAC 23.163(g).

[15] AS 43.23.005(a)(4) requires that an applicant must be physically present in Alaska for at least 72 consecutive hours at some time during the prior two years before the current dividend year.

3. *Whether intent to return is conditioned on future events beyond the individual's control, such as economics or finding a job in Alaska.* Lt. Col. G plans on requesting Alaska as a duty station on his next rotation after his oldest child graduates in 2012 from high school. This factor is neutral.

4. *Any ties the individual has established outside Alaska (homes, taxes, voter registration, etc.).* Lt. Col. G has a house in North Carolina which he rents. He testified that he would like to sell the house but the market makes it economically infeasible. His testimony on this point is unchallenged. This factor is neutral.

5. *Priority the individual gave Alaska in employment assignment preference.* Lt. Col. G's military career path took him to Germany. When he can move he plans to request reassignment to Alaska. Based on Lt. Col. G's testimony, this appears reasonable. His failure to have an active request for 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.* This is not true of Lt. Col. G 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 returning 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.[16]

7. *Ties to Alaska such as real property, voter registration, etc.* The Gs have a house which they are renting out during their absence. They have paper ties and Ms. G has a sister who lives close to their house. This factor is not neutral but neither is it compelling in the Gs' favor.

Most of the factors are neutral. Most damaging is the length and frequency of return trips to Alaska. Ms. G'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. Lt. Col. G indicated that, had they known how the division counted days, Ms. G and the children would have extended their time in Alaska. This is persuasive evidence that the Gs could have stayed longer had they chosen to do so and supports a finding that the Gs returned to Alaska to fulfill eligibility requirements, not because of a desire to be in Alaska and remain indefinitely. Therefore, it is reasonable to conclude that had Lt. Col. G taken leave to accompany his family to

[16] 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).

Alaska, it would have made no difference in the amount of time spent in the state. The factors do not weigh in favor of Lt. Col. G. Therefore, he has not rebutted the presumption created by an absence exceeding five years. Because Lt. Col. G is not eligible for a 2011 PFD, neither is Ms. G or the children.

IV. Conclusion

Lt. Col. G 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 the applications of T G and D G for a 2011 PFD.

DATED this 29th day of December, 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 27th day of January, 2012.

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

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