

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

In the Matter of:)
)
J and M P)
) OAH No. 11-0353-PFD
2011 Permanent Fund Dividend) Agency No. 2011-049-1082/2011-049-1195

DECISION

I. INTRODUCTION

J P and M P submitted applications for 2011 Permanent Fund Dividends (PFD).¹ The Permanent Fund Dividend Division (Division) denied Mr. P's application because he had been absent for five years or more and the Division determined that he no longer had the intent to return to Alaska.² The Division denied Mrs. P's application because she was absent accompanying a member of the military who was not eligible for a PFD.³

The Ps filed informal appeals of these decisions, but the Division affirmed its original determinations. The Ps then requested a formal hearing. A hearing was held on October 17, 2011. Mr. P and PFD specialist Bethany Chase both appeared by telephone. A second hearing was held on October 28, 2011. Mr. P, Mrs. P, and Ms. Chase all appeared by telephone. For the reasons discussed below, the Division's determination is affirmed.

II. FACTS⁴

Mr. P first moved to Alaska on August 2, 2000.⁵ He was transferred out of state on June 14, 2005.⁶ For most of the past five years, Mr. P was assigned to duty in Korea where he has been in charge of planning for major military exercises each year. Because of his responsibilities, he has had limited opportunities to leave the country. Even while on leave, he usually stayed near the military base so he could go into the office to see if anything needed his attention. Because of the wars in Iraq and Afghanistan, it has also become more difficult to have other officers available in Korea to take over his responsibilities while on leave. In addition, out

¹ Exhibit 1.

² Exhibit 4, page 1.

³ Exhibit 4, page 5.

⁴ Unless otherwise noted, these factual findings are based on Mr. P's testimony.

⁵ Formal Hearing Position Statement, page 1.

⁶ Exhibit 2, page 1.

of country leave is restricted over the Christmas holidays to no more than 10% of each unit's staff, further limiting his ability to come to Alaska. The Ps also have two children in school, so their ability to travel is restricted by the children's school schedule.

Mr. P has returned to Alaska twice in the last five years. He was in Alaska for 8 days in 2007 and 9 days in 2009.⁷ Mr. P was also in Alaska for 33 days during 2011, from June 23 through July 26.⁸ Mr. P's brother-in-law owns a business in Anchorage, and Mr. P intends to either manage that business after he retires from the military, or open a new business with the support of his brother-in-law.

Mrs. P also left Alaska in 2005, but she has returned more often. She was in Alaska for a total of 102 days since leaving in 2005.⁹ Mrs. P returned to physically reside in Alaska in May of 2010. She left shortly thereafter to attend the University of Southern California where she is studying for a Master's degree in teaching.¹⁰ She was a full time student from August 23, 2010 through December 3, 2010.¹¹

III. DISCUSSION

A. Eligibility Requirements

The PFD eligibility requirements relevant to this case are that an applicant must be a resident of Alaska¹² and be present during the entire year or absent for an allowable reason.¹³ A resident may be absent for an unlimited number of days each year if the absence occurs while the person is serving on active duty as a member of the armed forces.¹⁴ In addition, a spouse accompanying a member of the armed forces may also be absent for an unlimited number of days to accompany his or her spouse as long as the service member is also eligible to receive a PFD.¹⁵ A member of the military or his or her accompanying spouse may also be absent for an additional 180 days each year unless claiming an allowable absence in addition to the military absence.¹⁶

⁷ Exhibit 2, page 1.

⁸ Exhibit 7, page 1.

⁹ Exhibit 2, page 3. The Division's calculation shows she has returned for 78 days. Formal Hearing Position Statement, page 3.

¹⁰ Exhibit 5, page 4.

¹¹ Exhibit 10, page 1.

¹² Alaska Statute 43.23.005(a)(2).

¹³ AS 43.23.005(a)(6).

¹⁴ AS 43.23.008(a)(3). After ten years of absence, a different rule applies. *See* AS 43.23.008(c).

¹⁵ *Id.*

¹⁶ AS 43.23.008(a)(17)(A).

A resident may also be absent for an unlimited number days while out of state receiving a secondary or postsecondary education as a full time student.¹⁷ A person who claims an allowable absence as a full time student may also be absent up to 120 days in addition to the time absent as a student.¹⁸

A person may remain a resident of Alaska while absent from the state as long as he or she is not absent under circumstances that are inconsistent with the intent to remain in Alaska indefinitely and to make a home in Alaska.¹⁹ The Department of Revenue has adopted regulations to assist the Division in determining whether an individual continues to have the intent to remain in Alaska indefinitely. An individual who has been absent from Alaska for more than five years is presumed to no longer have the intent to remain indefinitely in Alaska.²⁰ This presumption is rebuttable, and the Division considers several factors in deciding whether the individual has in fact shown that he maintains the required intent.²¹ In applying those factors, greater weight is given to the claim of an individual who makes frequent return trips to Alaska.²² The Division will

generally consider that an individual who has not been physically present in Alaska for at least 30 cumulative days during the past five years has not rebutted the presumption; however, this consideration does not apply if the individual shows to the department's satisfaction that unavoidable circumstances prevented that individual from returning for at least 30 cumulative days during the past five years.^[23]

This last provision establishes a double presumption against eligibility. Unless an applicant can show that unavoidable circumstances prevented him from returning for at least 30 days, there is a strong presumption that the applicant no longer has the intent to return to and remain in Alaska indefinitely.

B. M P's Eligibility Status

Mrs. P has returned to Alaska for more than 30 days during the past five years. Thus, the double presumption of 15 AAC 23.163(h)(2) does not apply to her. It is not necessary to determine whether Mrs. P has rebutted the presumption under 15 AAC 23.163(f), however, even

¹⁷ AS 43.23.008(a)(1).

¹⁸ As 43.23.008(a)(17)(B).

¹⁹ AS 01.10.055. Residency and eligibility are separate issues. A person must be a resident to be eligible, but a resident will not be eligible for a PFD if his or her absence during the year is not an allowable absence.

²⁰ 15 AAC 23.163(f).

²¹ 15 AAC 23.163(f)(1) – (7).

²² 15 AAC 23.163(h)(1).

²³ 15 AAC 23.163(h)(2).

if she remains a resident of Alaska, her eligibility to receive a PFD is still tied to her husband's eligibility.²⁴

Assuming she remains a resident for PFD purposes, Mrs. P is eligible to claim her absence while receiving postsecondary education. She was a full time student for 102 days during 2010. She was also in Alaska for 61 days before leaving for school. She was, however, absent from Alaska for 202 days in addition to the educational absence. Unless she can claim an allowable absence for accompanying Mr. P, she was absent from Alaska for 82 days more than the 120 days permitted for residents claiming an educational allowance.²⁵

As the wife of a member of the armed forces, Mrs. P has an allowable absence while accompanying her husband, but only if he is eligible to receive a PFD.

C. J P's Eligibility Status

It can be very difficult to determine a person's subjective intent to return to Alaska. This becomes particularly hard in a case like this where Mr. P has seven more years of military service before he can retire to Alaska. Accordingly, the Division looks to objective factors that usually correspond to a person's intent rather than simply weigh each applicant's credibility.²⁶

Because Mr. P has not been in Alaska for at least 30 cumulative days during the past five years, it is first necessary to determine whether there have been unavoidable circumstances preventing him from returning for that amount of time. Prior decisions demonstrate that even for members of the military it is difficult to establish that unavoidable circumstances have prevented an applicant from returning for 30 days during the five year period.

In re K.A.P.,²⁷ compares cases addressing this issue. One case in which unavoidable circumstances were found involved a service member stationed in Europe. Returning to Alaska would have required difficult trips with four young children. In addition, he was assigned to an undermanned Navy position, had lost accrued leave because of an inability to take leave, had his leave denied five times, and had been told that future leave would be restricted. That applicant was able to establish that unavoidable circumstances prevented him from returning to Alaska.²⁸

²⁴ Mrs. P could remain a resident even if her husband is not a resident.

²⁵ If she did not claim an educational absence, she would have an allowable absence of 180 days for any reason. She was absent from Alaska for 304 days during 2010.

²⁶ *In re I., P., B., M., K. & L. H.* OAH No. 08-0210-PFD (Dept of Revenue 2010).

²⁷ OAH No. 09-0274-PFD (Dept of Revenue 2009).

²⁸ *In re K.A.P.* at page 4.

In a different case, the applicant had returned for 28 days during the five years of absence. He had shown that it would be expensive and inconvenient to return to Alaska for more days, but not that he had been prevented from returning. This was insufficient to establish unavoidable circumstances.²⁹

Mr. P has shown that it would have been difficult for him to return to Alaska more often. He has not however, proven that unavoidable circumstances prevented him from returning. While his children's ability to travel was limited to the school schedule, it was possible for Mr. P to return alone, leaving his family in Korea. Based on Mr. P's testimony, it might have looked bad on his record to leave the country while on leave, but he was not actually prevented from doing that.

Because Mr. P has not returned for at least 30 days during the last five years, there is a double presumption that makes it extraordinarily difficult for Mr. P to be eligible for a PFD.³⁰ Several factors are considered in deciding whether this double presumption has been rebutted.

1. *Length of absence compared to time spent in Alaska before departing.*³¹ Mr. P moved to Alaska on August 2, 2000.³² Thus, Mr. P lived in Alaska for slightly less than five years before leaving. He has been absent for more than five years. This factor weighs against a finding of continued intent to return.

2. *Frequency and duration of return trips.*³³ Mr. P returned twice during the last five years, for a total of 17 days. On the other hand, Mrs. P has returned more often. Although each person's residency is determined separately, it is reasonable to look at the entire family unit when considering whether each individual retains a continued intent to return to Alaska. That his wife has returned more often could be seen as an indication that the entire family does intend to return. On the other hand, Mrs. P has family in Alaska and may simply be visiting them without intending to return to live in Alaska in the future. The evidence concerning return trips is not sufficient to avoid the double presumption against eligibility, but because of Mrs. P's return trips this factor does not weigh against a finding of continued intent to return.

²⁹ *In re K.A.P.* at pages 4 – 5.

³⁰ *In re P.O., V.O. & B.O.* OAH No. 10-0444 PFD (Dept of Revenue 2010), pages 3 – 4.

³¹ 15 AAC 23.163(g)(1).

³² Formal Hearing Position Statement, page 1. He was apparently not considered a resident until sometime after that date, but he did actually spend time in Alaska beginning in August of 2000.

³³ 15 AAC 23.163(g)(2).

3. *Whether intent to return is conditioned on future events beyond the individual's control.*³⁴ Mr. P testified credibly that he intends to return to Alaska once he retires from the Army regardless of any future events. While he is not eligible for an assignment in Alaska, Mr. P's retirement is within his control, and he does intend to return at that time. This factor weighs in favor of finding intent to return.

4. *Established ties outside of Alaska.*³⁵ The Ps rent a home where they are currently living, but there is no evidence of any other ties outside of Alaska. This factor weighs in favor of finding the intent to return.

5. *Priority given to an Alaska employment assignment.*³⁶ Mr. P testified that because of his particular area of expertise, he is not eligible for an assignment in Alaska. That he has not asked for an assignment that he would not receive does not weigh against him, but neither does it weigh in his favor.

6. *Career choice that does not allow the individual to reside in Alaska.*³⁷ Choosing a military career, or a specialty within a military career, will often preclude living in Alaska. The Legislature, however, has specifically gone out of its way to provide protections for people who choose a military career.³⁸ This regulatory factor was not intended to cut against military personnel simply because most military assignments are not in Alaska.³⁹ This factor is neutral in regards to Mr. P's intent to return.

7. *Ties to Alaska.*⁴⁰ The Ps own a home in Alaska which is currently being rented. Mr. P has an Alaska driver license. He has not, however, voted in Alaska elections. The Ps have family in Alaska, and in 2011 Mr. P spent 33 days in Alaska assisting his brother-in-law in establishing a new business. Although not voting detracts from showing intent to return, overall, this factor weighs in favor of Mr. P's intent to return.

In weighing the effect of these factors against the double presumption, it is not sufficient to simply count how many factors weigh for or against a finding of Mr. P's intent to return. Although there are several factors that count in his favor, the evidence in support of each is not very strong. An applicant must present strong objective evidence of the intent to return in order

³⁴ 15 AAC 23.163(g)(3).

³⁵ 15 AAC 23.163(g)(4).

³⁶ 15 AAC 23.163(g)(5).

³⁷ 15 AAC 23.163(g)(6).

³⁸ See AS 43.23.008(a)(3).

³⁹ See *In re P.O., V.O. & B.O.*, page 5.

⁴⁰ 15 AAC 23.163(g)(7).

to overcome the double presumption.⁴¹ The evidence presented by Mr. P is not sufficient to meet that burden. Mr. P has not met his burden of overcoming the presumption that he does not intend to return to Alaska and remain indefinitely.

IV. CONCLUSION

Mr. P has not rebutted the double presumption that a person who has been absent from Alaska for five years or more, and who has not returned for at least 30 cumulative days during that absence, does not have the intent to return to Alaska. The decision of the Permanent Fund Dividend Division to deny the applications of J P and M P is AFFIRMED.

Dated this 2nd day of November, 2011.

Signed

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 29th day of November, 2011.

By: Signed

Signature
Jeffrey A. Friedman

Name
Administrative Law Judge

Title

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

⁴¹ See *In re P.O., V.O. & B.O.*, page 5.