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

IN THE MATTER OF	)	
E D	)	OAH Case No. 11-0408-PFD
	)	Agency Case No. 2011-023-5129
2011 Permanent Fund Dividend	)	

DECISION & ORDER

I. Introduction

E D timely applied for a 2011 permanent fund dividend. The Permanent Fund Dividend Division determined that Ms. D was not eligible, and it denied her application initially and at the informal appeal level. Ms. D requested a formal hearing. Administrative Law Judge Mark T. Handley heard the appeal on December 8, 2011. Ms. D appeared by in person with her husband. Bethany Chase represented the PFD Division by telephone. The administrative law judge finds that Ms. D is eligible for a 2011 dividend.

II. Facts

Ms. D's husband is serving on active duty in the U.S. Army. Mr. D is a Lt. Colonel and the second in command in his unit. The first in command is single, so Ms. D is the highest ranking officer's spouse in his battalion, which has 1100 soldiers. Ms. D is looked to for organizing support services for the spouses and families. This duty becomes especially demanding immediately prior to a deployment of her husband's unit. Mr. D has been deployed twice since they left Alaska.

Ms. D qualified for a 2010 PFD despite being on an absence from Alaska that exceeded five years in duration. Ms. D's husband qualified for both the 2010 and 2011 PFD despite being on an absence from Alaska that exceeded five years in duration. The Division would probably have determined that Ms. D was also eligible for a 2011 PFD had her total return trips to Alaska equaled at least 30 days in the five years prior to 2011 because her husband qualified with the primary difference in their circumstances being that he was in Alaska more than 30 days during the past five years. Ms. D's return trips to Alaska totaled only 28 days in the five years prior to 2011. Ms. D's total return trips to Alaska would have equaled at least 30 days in the five years prior to 2011 if her 2009 trip to Alaska had not been unexpectedly cut short when she learned that her husband's unit had received orders for deployment to a war zone and her immediate return was needed to help coordinate support services for the spouses and families of the solders in her husband's unit. Ms. D

explained that these deployments can be very stressful for spouses and their families, especially young spouses, and that sometimes there are even suicides as the result of a deployment. Ms. D also returned in 2010, but only for a few days. Ms. D thought that she had been back 30 days over the past five years, but she did not understand the way that the Division counts days in Alaska. Ms. D returned to Alaska again for a visit in 2011 for 11 days.

Ms. D lived in Alaska for just under five years between October 12, 1998 and October 4, 2003. While Ms. D was living in Alaska, her husband, a career officer, served on assignment at Ft. Wainwright. While she was living in Alaska, Ms. D worked. Since she left she has stayed in contact with her former Alaska employer and has visited with them during her return trips. During her absence from Alaska her former Alaska employer has told her that they hope that she will come work for them again when she moves back. While she was living in Alaska, Ms. D and her husband made close friends who are still living in Alaska. Ms. D and her husband visit these friends when they return. Ms. D and her husband left Alaska so that he could serve a tour of duty outside Alaska, which began in 2003.

Mr. D is stationed in Texas. Ms. D and her husband live in employer-provided housing. Ms. D has been preparing for future employment in Alaska. She now works for the Army's nonprofit organization and would be able to transfer to a position in Alaska if her husband transfers back. Ms. D is also, as noted above, in touch with her former Alaska employer.

Ms. D explained that they thought they would have been transferred back to Alaska already after the last deployment. Mr. D and Ms. D explained that they planned to transfer back to Alaska but the planned transfer did not go through because the unit Mr. D was expecting to transfer to was deployed and he had just returned from a deployment.

Ms. D plans to move back to Alaska after this tour of duty or after her husband retires from the Army. Mr. D believes that as a senior Lieutenant Colonel, he will be able to get a job with the Department of Defense in Alaska when he retires. Ms. D has maintained Alaska as her state of legal residence in her personnel records during her absence. She remained a registered voter in Alaska and maintained an Alaska driver's license. She has no significant ties of residency outside Alaska. During their return visits to Alaska Ms. D and her husband spend some of their time looking at areas where they might like to live when the move back. [1]

[1] Recording of Hearing.

III. Discussion

A person who has been allowably absent for more than five years is, by law, presumably not an Alaska resident anymore.[2] If an applicant attempts to overcome this presumption, the Division may rely on the following factors when making a decision[3]:

> (1) the length of the individual's absence compared to the time the individual spent in Alaska before departing on the absence;
>
> (2) the frequency and duration of return trips to Alaska during the absence; the fact that the individual has returned to Alaska in order to meet the physical presence requirement of AS 43.23.005 (a)(4) is not sufficient in itself to rebut the presumption of ineligibility;
>
> (3) whether the individual's intent to return or remain is conditioned upon future events beyond the individual's control, such as economics or finding a job in Alaska;
>
> (4) any ties the individual has established outside Alaska, such as maintenance of homes, payment of resident taxes, vehicle registrations, voter registration, driver's licenses, or receipt of benefits under a claim of residency in another state;
>
> (5) the priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel;
>
> (6) whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska; and
>
> (7) any ties the individual has maintained in Alaska, such as ownership of real and personal property, voter registration, professional and business licenses, and any other factors demonstrating the individual's intent.

When considering these factors, the Division must "give greater weight to the claim of an individual 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."[4] In considering what constitutes "frequent" return trips, thirty days in five years serves as a kind of guideline. Unless unavoidable circumstances have prevented return trips, the Division must "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" that she is no longer an Alaska resident.[5] The final rule governing this case is that a person requesting a formal hearing has the burden of proving that the Division's decision was in error.[6]

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2 15 AAC 23.163(f).
3 15 AAC 23.163(g).
4 15 AAC 23.163(h)(1).
5 15 AAC 23.163(h)(2).
6 15 AAC 05.030(h).

In weighing evidence of residency, the law directs that more weight be given to applicants who have made frequent voluntary return trips to Alaska. The law offers thirty days in five years as a yardstick of what constitutes frequent returns.

Ms. D and her husband were both very credible witnesses. They frankly admitted facts that could weigh against Ms. D's eligibility. Ms. D stated that she plans to move back to Alaska when Mr. D completes his military service or is assigned back to Alaska, either at the end of this tour or when he retires.

Ms. D missed the 30-day measure primarily due to an unexpected need for her to return early from her 2009 visit to Alaska in order to provide critical pre-deployment support services, which shortened her Alaska visit and caused her five year total to be two days short of 30 days. There is sufficient evidence in the record to find that unavoidable circumstances prevented Ms. D from being in Alaska more than the 28 days. Ms. D not only planned visits to Alaska that would have exceeded 30 days in total. She actually traveled to Alaska for these visits. Unfortunately, she had to cut one of these visits short due to unforeseen circumstance.

The 30 day presumption does not apply at all when the failure to return is due to unavoidable circumstances.[7] 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.[8]

The Division argues that the circumstances that cut short Ms. D's 2009 visit did not make her failure to spend more time in Alaska unavoidable, and in a sense the Division is correct. Almost no circumstances make a failure to return to Alaska unavoidable in the sense that the circumstances make it impossible to spend thirty days in Alaska. The unavoidable circumstances exception could be read to include circumstances such as Ms. D's, whose circumstances were the type of unusual circumstances that one would expect would prevent an Alaskan resident from returning for 30 days in five years. Ms. D planned returns visits that would have brought her back for more than thirty days and even made these visits, but fell slightly short of the expected 30 day test because of unexpected events that required an early departure on one of these planned return visits.

It is not necessary, however, to determine if Ms. D's circumstances met the unavoidable circumstances exception. Even without unavoidable circumstances, the 30-day presumption does not necessarily prevent an Alaskan from overcoming the disqualifying presumption. Rather, it is an

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7 15 AAC 23.163(h)(2).

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

important 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."[9]

The applicant's burden is to rebut both the 30 day and the five year presumptions by a preponderance of the evidence.[10] 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 evidence that will not only bring the scale back in balance but tip it in favor of residency. This does not mean 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 both presumptions, 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, continued Alaska residency can be shown and PFD eligibility can be established.[11]

Ms. D has shown that she maintained the intent to return to Alaska and maintain a home indefinitely during her extended absence. Ms. D makes regular extended return visits to Alaska and only fell slightly short of being in Alaska for 30 days in the five years before 2011. She would have exceeded 30 days but for her need to respond to an unforeseen circumstance. She has been in Alaska more than thirty days during the five years before 2012. Both Ms. D and her husband are still Alaska residents. The Division has recognized that Mr. D has maintained his residency. The evidence in this case shows that the difference in the number of days that Mr. D and Ms. D were in Alaska over the past five years is not the result of a difference in their commitment to move back to Alaska. Ms. D has established strong ties to Alaska. She has not established any significant ties to any other state. Ms. D has clearly been planning her move back to Alaska and has been taking steps to prepare for that return. This is evidence of her intent to return during her absence, which falls within the category of "other factors demonstrating the individual's intent."[12]

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9 15 AAC 23.163(f) (g) & (h).

10 2 AAC 64.290(e); 15 AAC 05.030(h).

11 *In re M. & A. R.*, OAH No. 06-0228-PFD (September 2006) at 3.

12 15 AAC 05.030(h)(7).

This case qualifies as a very rare exception to the rule requiring the department to "generally" consider that a person who has not returned to Alaska for more than thirty days in five years has not rebutted the presumption that she is no longer an Alaska resident.

IV. Conclusion

Considering all of the evidence in this case, I find that Ms. D has rebutted the presumption that she no longer has the intent to return to Alaska to remain indefinitely. Despite a lengthy absence, Ms. D remained an Alaska resident and her absence was allowable for spouse of active duty in the armed forces. Ms. D is eligible for a 2011 permanent fund dividend.

DATED this 23rd day of January, 2012.

By: *Signed*
Mark T. Handley
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 21st day of February, 2012.

By: *Signed*
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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