

**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. 11-0429-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-052-9486

DECISION

I. INTRODUCTION

Lieutenant Colonel B R applied for a 2011 Permanent Fund Dividend (PFD) for himself and for each of his three children. Lt. Col. R's application was denied by the Permanent Fund Dividend Division (division) because he had been unallowably absent from the state. 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 on December 20, 2011. Lt. Col. R appeared in person. The division was represented by PFD Specialist Peter Scott, who appeared by telephone. Based on the evidence and legal argument presented at the hearing, Lt. Col. R is not eligible to receive a 2011 PFD. Because they do not have an eligible sponsor, his children are also not eligible.

II. FACTS

This is the third time that Lt. Col. R has formally appealed the denial of his PFD application and the applications on behalf of his children. The facts in this appeal are essentially the same as in the prior appeals.¹ Lt. Col. R has been and remains a life-long Alaska resident. He attended the United States Naval Academy and has served in the United States Marine Corps since his graduation. He votes in Alaska, owns real estate here, and makes frequent return visits. He has done nothing to sever his Alaska residency, and intends to return to Alaska once he retires from the Marine Corps.² Because of his service in the Marine Corps, however, Lt. Col. R

¹ *In re B.A.R.*, OAH No. 10-0020-PFD (Commissioner of Revenue 2010), *affirmed on appeal*, 3AN-XX-XXXX CI (Superior Court 2011); *In re B.R.*, OAH No. 11-0222-PFD (Commissioner of Revenue 2011).

² *See* Exhibit 5, pages 3 – 8.

was absent from Alaska for more than 180 days during 2010, the qualifying year for a 2011 PFD, and in each of the preceding ten qualifying years.³

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 only for an allowable reason.⁴ In addition, one must be a state resident during the entire qualifying year.⁵

The distinction between residency and eligibility can be confusing. It is possible for a person to lose their status as an Alaska resident for PFD purposes.⁶ Such a person might still be considered an Alaska resident under other statutes, but would not be eligible for a PFD.⁷ Other individuals may remain Alaska residents for PFD purposes, but still be ineligible to receive a PFD in a particular year. For example, a person who leaves the state for a seven month cruise around the world – assuming the cruise was purely a vacation – could still remain an Alaska resident but would not be eligible for a PFD.⁸ As discussed below, Lt. Col. R remains an Alaska resident for PFD purposes, but is not eligible to receive a PFD because he has been absent for more than the allowable number of days.

During his military career, Lt. Col. R was allowably absent as an active duty member of the U.S. armed forces.⁹ His children qualified as minor dependents accompanying an active duty member of the armed forces.¹⁰ Beginning in 2008, the qualifying year for the 2009 PFD, his absence was not qualified because of a different 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

³ Exhibit 5, page 7.

⁴ AS 43.23.005(a)(6).

⁵ AS 43.23.005(a)(3).

⁶ See 15 AAC 23.143 (establishing and maintaining Alaska residency).

⁷ *State v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (The residency requirement for PFD purposes may be different than the residency requirements of other statutes).

⁸ AS 43.23.008(17) (maximum allowable absence is 180 days if no other allowable absence is applicable).

⁹ AS 43.23.008(a)(3).

¹⁰ *Id.*

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.^[11]

Based on this statute, Lt. Col. R was not eligible to receive a 2009 or a 2010 PFD. In this appeal, Lt. Col. R raises all of the same arguments previously raised. Those issues are resolved against him for the same reasons stated in the prior decisions as well as the reasons stated in the Superior Court decision.¹²

Lt. Col. R has also made new arguments in this appeal that were not raised in his earlier appeals. First, he argues that AS 43.23.008(c) does not apply to this appeal at all because he was not eligible for 2009 and 2010 PFDs. Instead, Lt. Col. R argues that his eligibility should be determined under AS 43.23.008(a)(17)(A). This subsection allows for up to 180 days of absence from the state for any reason in addition to any absence that might be claimed as an absence for military service.¹³

Lt. Col. R' argument ignores the structure of this statute. The statutory language begins:

- (a) *Subject to (b) and (c) of this section*, an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent^[14]

Subsection (a) then goes on to list 17 different reasons why one may be absent and still remain eligible to receive a PFD.¹⁵ Most of these 17 reasons do not have any time limit.¹⁶ For example, a person may be absent the entire year while serving on active duty in the armed forces or while receiving continuous medical care out of state.¹⁷ As specifically stated in subsection .008(a), however, all of these reasons are subject to subsection .008(c). Regardless of whether Lt. Col. R makes a claim of eligibility under .008(a)(3) or .008(a)(17)(A), his claim for an allowable absence is still subject to .008(c). Based on subsection .008(c), he is not eligible for a 2011 PFD

¹¹ AS 43.23.008(c). Sub-sections (a)(9) and (a)(10) create allowable absences 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.

¹² Lt. Col. R has raised significant legal questions about the interpretation and constitutionality of AS 43.23.008(c). He has appealed the first decision to the Alaska Supreme Court. It is appropriate for him to preserve his rights by appealing each subsequent denial, at least until the Supreme Court answers those questions.

¹³ AS 43.23.008(a)(17) is the provision that allows many Alaskans to remain eligible for a PFD despite taking a vacation out of state during the qualifying year. Any resident may be allowably absent for 180, 120, or 45 days without losing their eligibility. The maximum length of an allowable absence under this subsection depends on whether the resident is claiming any other allowable absence, and if so which other allowable absence.

¹⁴ AS 43.23.008(a) (emphasis added).

¹⁵ Assuming the person does not lose his or her eligibility for some other reason.

¹⁶ Only .008(a)(8) and .008(a)(17) are restricted as to length of absence.

¹⁷ AS 43.23.008(a)(3) & (5).

because he was absent from Alaska for more than 180 days during 2010 and for more than 180 days in each of the preceding 10 qualifying years.

Lt. Col. R is correct to note that he was not eligible for a 2009 or 2010 PFD. Accordingly, he has not been eligible for the “immediately preceding 10 dividends” as specified in AS 43.23.008(c). A literal reading of this statute would make this provision inapplicable. In a prior decision, the commissioner ruled that in enacting subsection .008(c) the legislature did not intend to “create a rule that would say one who was absent from the state for many years would only be ineligible for a PFD once every ten years.”¹⁸ In that prior case, the applicant had not filed in an earlier year, and therefore was not eligible in each of the prior ten years.¹⁹ In this case, Lt. Col. R has applied each year, and the only reason he was not eligible in the prior two years was because of the application of AS 43.23.008(c). As discussed in *In re N.W.*, the legislative intent was focused on the applicant’s absence. Regardless of why a person did not receive a prior PFD, the intent of the legislature was that a person who has been absent from the state for more than 180 days in each of the preceding ten qualifying years would not be eligible for the current year PFD if he or she was also absent for more than 180 days in the qualifying year for the current year PFD.²⁰ In enacting subsection .008(c), the legislature did not intend that a person with an extended absence would only lose his or her eligibility once every ten years.

Lt. Col. R also claimed that AS 43.23.008(c) unfairly burdened those serving in the Marine Corps as opposed to military personnel serving in the U.S. Army and U.S. Air Force. He testified that there are several Army and Air Force installations in Alaska. An Alaska resident serving in either of those branches can serve out of state for several years and then request an assignment in Alaska. Because there are thousands of service members serving in Alaska from those branches, he or she would have a reasonable chance of being assigned here for more than 180 days in a given year, thereby resetting the ten year clock established by AS 43.23.008(c).

A Marine, however, does not have this same opportunity. The uncontradicted evidence from Lt. Col. R is that there are only about ten active duty Marine positions in Alaska. According to Lt. Col. R, the likelihood of a Marine obtaining an assignment in Alaska is very slight.

¹⁸ *In re N.W.*, OAH No. 10-0612-PFD (Commissioner of Revenue 2011), page 3.

¹⁹ *In re. N.W.*, page 2.

²⁰ *See In Re B.A.R.*, OAH No. 11-0222-PFD, pages 3 – 4.

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.²¹ The purpose of subsection .008(c) was to create a bright line rule that cut off eligibility after ten years. To interpret this statute as allowing exceptions would defeat that purpose. The Division must apply this statute as written, and the statute does not allow a distinction between military personnel based on the branch of service they are in. Whether the different impact on different branches of the service makes this statute unconstitutional is not something that can be resolved by the commissioner. Generally, it is not the role of the executive branch to rule on facial challenges to the constitutionality of a statute.²² That function belongs to the judicial branch and unless there is a judicial ruling invalidating a particular statute, the executive branch must obey that statute.

IV. CONCLUSION

There is no evidence in the record that Lt. Col. R has done anything to sever his Alaska residency. Because of his military career, however, he has been absent from Alaska for more than 180 days in each of the ten preceding qualifying years and has also been absent from Alaska for more than 180 days in 2010, the qualifying year for a 2011 PFD. Accordingly, he is not eligible to receive a 2011 PFD pursuant to AS 43.23.008(c). Because they do not have an eligible sponsor, Lt. Col. R' children are also not eligible. The division's decision to deny these applications is affirmed.

Dated this 3rd day of January, 2012.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

²¹ *Young v. Embley*, 143 P.3d 936, 939 (Alaska 2006).

²² *See, e.g., Howard v. Federal Aviation Administration*, 17 F.3d 1213, 1218 (9th Cir. 1994); *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir. 1992); *In the Matters of Holiday Alaska, Inc.* OAH No. 08-0245-TOB.

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 6th day of February, 2012.

By: Signed
Signature
Angela M. Rodell
Name
Deputy Commissioner
Title

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