

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

In the Matter of:)		
)		
D J and)	OAH No.	12-0129-PFD
A G-J)	Agency No.	2011-042-8060
)		2011-042-8022
<u>2011 Permanent Fund Dividend</u>)		

DECISION

I. Introduction

Major D J and his wife A G-J applied to receive Permanent Fund Dividends (PFD) for 2011.¹ The Permanent Fund Dividend Division (division) denied their applications because Maj. J had been absent from the state for more than five years and was, therefore, presumed to no longer intend to return to Alaska,² and because Ms. G-J was absent accompanying Maj. J, who was no longer eligible to receive a PFD.³

After completing the informal appeal process, the division did not change its determination.⁴ Maj. J and Ms. G-J requested a formal hearing.⁵ The hearing was held on June 18, 2012. Both Maj. J and Ms. G-J appeared by telephone. The division was represented by PFD Specialist Bethany Thorsteinson, who also appeared by telephone. Based on the evidence presented, the division's determination is reversed.

II. Facts

Maj. J first came to Alaska in 1998.⁶ He did not file for a PFD right away because he was not sure he could stay in Alaska for the long term. He and Ms. G-J were married in October of 2000, and by then he knew that he wanted to be in Alaska, and fully intends to return when his military service permits, or when he retires.

Maj. J was transferred, and he and his wife left Alaska in the fall of 2001. Although he has applied for Alaska assignments, he has not received one since leaving Alaska and, except for

¹ Exhibit 1, pages 1 and 4.

² Exhibit 4, page 1.

³ Exhibit 4, page 7.

⁴ Exhibit 8, pages 1 and 10.

⁵ Exhibit 9.

⁶ Unless otherwise noted, the factual findings are based on Maj. J' testimony.

short visits, they have been absent from Alaska since that date. During the five calendar years⁷ prior to applying for a 2011 PFD, Maj. J was able to return to Alaska twice: First in 2007 for eight days,⁸ and again in 2009 for five days.⁹ During that same time period, Ms. G-J returned for a total of 43 days.¹⁰

They own a home in Anchorage which they consider to be joint property, although the title is in the names of Ms. G-J and her parents, and Maj. J' name is not on the title.¹¹ That is the home they plan to live in once they are able to return to Alaska.

Maj. J testified that he would like to return to Alaska more often, but the demands of his job have prevented that. Maj. J is an intelligence officer for the Air Force. He was stationed in Omaha, Nebraska as the Chief of Targets during 2006. From January of 2007 through August of 2007, he was the Executive Officer for the Chief of Intelligence. Upon completion of this job he was assigned to "The Watch," which he described as a crisis center staffed by only four intelligence officers 24 hours a day, 7 days a week. He was promoted to Major in August of 2008 and transferred to a different squadron.

Maj. J was deployed to Iraq for six months beginning in March of 2009. Prior to deployment, he was required to complete various types of training, which precluded taking any extended leave for about three months before deploying. After returning from Iraq, Maj. J was transferred, in April 2010, to Maxwell AFB in Alabama. That transfer was rescinded, however, and he returned to Omaha. It was at this time that a position opened in Alaska, and Maj. J asked to be transferred to Alaska. That request was not granted, and instead he was moved to the Pentagon in October of 2010. Maj. J was deployed again, this time to Afghanistan, from November of 2011 through early June 2012.¹²

Maj. J testified that in each of his positions since at least January 1, 2006, he has been restricted in the amount of leave he could take, and the length of each leave. He could generally only take two or three days at a time. Before requesting leave, he discusses his plans with his commanding officer to find out what would be approved. Accordingly, leave is not formally denied because he only asks for what he has been orally told would be allowed. At least twice

⁷ January 1, 2006 – December 31, 2010.

⁸ Exhibit 6, page 8.

⁹ Exhibit 3, page 8.

¹⁰ Testimony of Ms. G J; Division's Position Statement, page 3.

¹¹ See Exhibit 13.

¹² Maj. J has been deployed a total of 14 times in his 24 year military career.

each year he has been told he could not take a longer period of leave because of the demands of his job. He lost 15 days of leave in 2007 because he was unable to use all of his accrued time off. He lost another week's worth of leave during the October 2010 – October 2011 fiscal year.

III. Discussion

A. Applicable Law

Among other requirements, a person must be a state resident during the entire qualifying year, and on the date of application, in order to be eligible to receive a PFD.¹³ A person may remain a resident while absent from Alaska as long as he or she maintains the intent to return to Alaska and remain in the state indefinitely and to make a home in Alaska.¹⁴ For PFD purposes, when an applicant has been absent from the state for more than 5 years, there is a presumption that he or she no longer has the intent to return to Alaska and remain indefinitely.¹⁵ Several factors are considered when determining whether this presumption has been rebutted.¹⁶ One factor is the frequency and duration of return trips to Alaska during the absence,¹⁷ and it is particularly difficult to overcome the presumption for applicants who have not returned for at least a total of 30 days during the five years:

[The] department 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.^[18]

When an applicant has not returned for at least 30 days, and cannot show that unavoidable circumstances prevented that return, "there is a strong presumption that the applicant no longer has the intent to return to and remain in Alaska indefinitely."¹⁹ In deciding whether the applicant has overcome the presumption against eligibility, all the factors in 15 AAC 23.163(g) must be considered even when unavoidable circumstances have not been shown.²⁰

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¹³ AS 43.23.005(a)(2) & (3).

¹⁴ AS 01.10.055.

¹⁵ 15 AAC 23.163(f).

¹⁶ 15 AAC 23.163(g).

¹⁷ 15 AAC 23.163(g)(2).

¹⁸ 15 AAC 23.163(h)(2).

¹⁹ *In re J and M P*, OAH No. 11-0353-PFD (Dept. of Revenue 2011), page 3. *See also In re D.E.B.*, OAH No. 09-0437-PFD (Dept. of Revenue 2009), page 2 ("It is very difficult – even for members of the military – to remain eligible to receive a PFD if they do not meet this 30 day requirement).

²⁰ *In re T and E C*, OAH No. 11-0404-PFD (Dept. of Revenue 2012), page 4.

B. Unavoidable Circumstances

Because Maj. J has not returned to Alaska for a total of 30 days or more between January 1, 2006 and December 31, 2010, it is necessary to determine whether unavoidable circumstances prevented him from returning more often.²¹

*In re J and M P*²² considered whether the applicant had demonstrated that unavoidable circumstances prevented his more frequent returns. The facts in that case have some similarities to the situation in this case.

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 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. Mr. P was also in Alaska for 33 days during 2011, from June 23 through July 26. 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.^[23]

In that case, it was found that Mr. P had not proven that unavoidable circumstances prevented more frequent returns.²⁴

In an earlier case, *In re I.H.*²⁵, the applicant was a member of the military stationed in Europe, and had only returned to Alaska for one seven day visit during the prior five years. He was able to demonstrate that his military duty had prevented more frequent returns. In addition, he established that he had unique skills in an undermanned area of the Navy and was rarely able to take leave. In one year, he was only able to take three days of leave, and lost 25 days of unused leave, and cashed in 45 days of accumulated leave while still carrying the maximum allowable 60 days forward into the next fiscal year. His leave requests had been denied five times, and he had been advised that he could not take more than a 14 day block of leave if leave

²¹ 15 AAC 23.163(h)(2).

²² OAH No. 11-0353-PFD (Dept. of Revenue 2011).

²³ *In re J and M P*, at 1 – 2 (internal footnotes omitted).

²⁴ *In re J and M P*, at 5.

²⁵ Caseload No. 020683 (Dept of Revenue 2003), described in *In Re K.A.P.*, OAH No. 09-0274-PFD (Dept of Revenue 2009), page 4.

was possible. This was sufficient to prove that unavoidable circumstances had prevented his more frequent returns to Alaska.²⁶

Maj. J' situation falls somewhere between these two cases. Except for his deployments, Maj. J has been stationed in the United States, so it is easier for him to return to Alaska when leave is granted. He has, however, testified that he has been restricted to only taking short periods of leave. Although it is physically possible to fly to Alaska and back when granted a two day leave, it is not reasonable to expect Alaska residents to make frequent one and two day return trips simply to meet the thirty day requirement. If an applicant's military service prevents him or her from taking leave in longer blocks of time, then that could establish unavoidable circumstances such that the 30 day presumption would not apply.²⁷

It is Maj. J' burden to prove to "the department's satisfaction" that unavoidable circumstances prevented him from returning for at least a total of 30 days.²⁸ This will usually require something more than just testimony that leave was restricted.²⁹ Maj. J' deployment for six months in 2009, his transfer to Maxwell AFB that was almost immediately rescinded, and his subsequent transfer to the Pentagon are all documented in the record. This evidence, along with his testimony that leave was restricted during other portions of those years, is sufficient to establish that unavoidable circumstances prevented more frequent returns during 2009 and 2010. For 2006 through 2008, however, there is no additional evidence to show that Maj. J could not return to Alaska more often. Maj. J did not meet his burden of proving that unavoidable circumstances prevented his return.

It is not necessary to make this same determination for Ms. G-J because she has returned to Alaska for more than 30 days during that same time period.

C. Ms. G-J' Intent to Return

Because Ms. G-J has been absent from Alaska for more than five years, it is necessary to look at each of the factors set out in 15 AAC 23.163(g) and determine whether she has rebutted the presumption that she does not have the intent to return.

²⁶ *Id.*

²⁷ Official notice is taken of the fact that this country was involved in two wars during the relevant five-year time period, and that these wars have placed additional burdens on individual service member's ability to take leave. Either party may submit evidence or legal authority to refute the officially noticed facts in that party's proposal for action. 2 AAC 64.300(a).

²⁸ 15 AAC 23.163(h)(2).

²⁹ The division processes many applications from out of state service members each year. If nothing more were required, there would be a temptation to exaggerate the difficulty in obtaining leave to return to Alaska.

1. *The length of the absence compared to the time the individual spent in Alaska before departing.*

Ms. G-J was born in Alaska, and lived in the state for 35 years before leaving. As of the date of application, she had been absent for approximately 9 years.³⁰ This factor weighs in favor of finding the intent to return.

2. *The frequency and duration of return trips.*

During the five years preceding her application, Ms. G-J returned to Alaska four times, for a total of 43 days. The shortest visit was for five days, and the longest was 19 days.³¹ This factor weighs in favor of finding the intent to return.

3. *Whether the intent to return is conditioned upon future events beyond the individual's control.*

Based on their testimony, the J both intend to return to Alaska when Maj. J retires. This is not conditioned on any other event beyond his retirement date. This factor weighs in favor of finding the intent to return.

4. *Established ties outside of Alaska.*

The J do own a house in Omaha. They purchased that home when Maj. J was stationed there, and have since owned it as a rental property. They also own their current home in Virginia where Maj. J is stationed. There is no evidence of any other ties outside of Alaska, and owning income producing property in another state is not a strong tie to that state. Owning their current home in Virginia is not a strong tie since Maj. J is currently stationed in that state, and the family has to live somewhere. This factor weighs in favor of finding the intent to return.

5. *The priority given to employment assignment in Alaska.*

This factor is not applicable to Ms. G-J who is accompanying her husband out of state.

6. *Whether the individual made a career choice that does not allow the individual to reside in Alaska.*

This factor is also not applicable to Ms. G-J.

7. *Ties the individual has maintained in Alaska.*

Ms. G-J owns a home, with her parents, in Alaska. This is the home the Js intend to live in once they do return. Her parents live in Alaska, and they have their vehicles registered in

³⁰ Division's Hearing Position Statement at 1.

³¹ Division's Hearing Position Statement at 3.

Alaska, and are registered to vote in Alaska. This factor weighs in favor of finding the intent to return.

All of the listed factors are either inapplicable or weigh in favor of finding that Ms. G-J does intend to return to Alaska and remain indefinitely. She has rebutted the presumption set out in 15 AAC 23.163(f), and remains an Alaska resident. However, she was absent from Alaska during 2010. Thus, she is only eligible to receive a PFD if her absence was an allowable absence.³² Being absent from the state while accompanying an active duty member of the armed forces is an allowable absence, but only if the active duty service member is eligible to receive a PFD.³³ Under these circumstances, Ms. G-J' eligibility is dependent on her husband's eligibility.

D. Maj. J' Intent to Return

The same factors set out above must also be considered in determining whether Maj. J has rebutted the presumption that he no longer has the intent to return to Alaska. However, as discussed above, Maj. J has not shown that unavoidable circumstances have prevented his return for at least 30 days in the past five years. Thus, there is an initial presumption that he *has not* rebutted the presumption that he no longer intends to return.³⁴ He must rebut both presumptions in order to show that he does intend to return to Alaska and remain indefinitely.

1. *The length of the absence compared to the time the individual spent in Alaska before departing.*

Maj. J was in Alaska for approximately three years before departing on an absence that has lasted nine years. This factor weighs against finding the intent to return.

2. *The frequency and duration of return trips.*

Maj. J has only returned to Alaska twice, for a total of 13 days, during 2006 through 2010. He also returned three times during 2002 through 2005, for a total of 37 days.³⁵ The pattern of return trips is sufficient to have this factor weighed as neutral.³⁶

3. *Whether the intent to return is conditioned upon future events beyond the individual's control.*

³² AS 43.23.005(a)(6).

³³ AS 43.23.008(a)(3)(B).

³⁴ 15 AAC 23.163(h)(2).

³⁵ Exhibit 6, page 8.

³⁶ Had he not been deployed three times during this 9 year period, the factor would have weighed against finding the intent to return, especially since his return trips have become less frequent in more recent years.

Maj. J intends to return to Alaska when he retires. His retirement is not a future event beyond his control. Accordingly, this factor weighs in favor of finding the intent to return.

4. *Established ties outside of Alaska.*

Maj. J' ties outside of Alaska are the same as his wife's ties discussed above. The lack of out of state ties weighs in favor of finding the intent to return.

5. *The priority given to employment assignment in Alaska.*

Maj. J testified that he has sought an assignment in Alaska. He has also submitted documentation to show that assignments in Alaska have not been available for the rank of Major. This factor weighs in favor of finding the intent to return.

6. *Whether the individual made a career choice that does not allow the individual to reside in Alaska.*

A military career is one that will almost always require living outside of Alaska for an extended period of time. However, the Commissioner has held that this factor does not apply to members of the armed forces.³⁷

7. *Ties the individual has maintained in Alaska.*

Maj. J is registered to vote in Alaska, and the couple have registered their vehicles in Alaska. Maj. J is not, however, on the title of the property they own in this state. Maj. J does have family ties in Alaska, as he has developed a close relationship with his wife's parents. Overall, this factor is neutral in determining whether Maj. J intends to return to Alaska.

When all of these factors are considered in light of the double presumption against finding the intent to return, Maj. J has not met his burden of proof but for one additional factor. Ms. G-J has met her burden of proving that she does intend to return to Alaska upon Maj. J' retirement. It is only because of the double presumption that Maj. J has not shown this as well. Absent some reason to suspect that the couple intends to separate when Maj. J retires, the fact that his wife intends to return to Alaska is additional evidence in support of finding that Maj. J also intends to return. This additional evidence is sufficient to tip the balance in his favor and find that Maj. J has overcome the double presumption.³⁸

³⁷ E.g., *In re J and M P*, at 6; *In re P.O.*, OAH No. 10-0444-PFD (Dept. of Revenue 2010), at 5.

³⁸ The "residency of an individual's spouse may not be the principal factor relied upon by the commissioner in determining the residency of the individual." AS 43.23.015(a). In this case, Ms. G-J' residency is not the principal factor, but it is an *additional* factor relied on to tip the balance in Maj. J' favor.

IV. Conclusion

Based on all of the evidence presented in this matter, Maj. J and Ms. G-J have met their burden of proving they intend to return to Alaska and remain in Alaska indefinitely.

Accordingly, they remain Alaska residents. Their absence during 2010 was an allowable absence under AS 42.23.008(a)(3), and they are both eligible to receive a 2011 PFD. The division’s denial of their applications is reversed.

Dated this 26th day of June, 2012.

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 23rd day of July, 2012.

By: Signed

Signature
Jeffrey A. Friedman

Name
Administrative Law Judge

Title

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