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

IN THE MATTER OF	)	
F AND S Q	)	OAH Case No. 13-0137-PFD
	)	Agency Case No. 2012-025-7655 &
2012 Permanent Fund Dividends	)	2012-025-7524

CORRECTED DECISION AND ORDER[1]

I. Introduction

F and S Q timely applied for 2012 permanent fund dividends. The Permanent Fund Dividend Division (Division) determined that Mr. and Ms. Q were not eligible, and it denied their applications initially and at the informal appeal level. Mr. and Ms. Q requested a formal hearing. Administrative Law Judge Mark T. Handley heard the appeal on March 6, 2013. Mr. and Ms. Q appeared by phone. Pete Scott represented the PFD Division by telephone. The administrative law judge finds that Mr. and Ms. Q are not eligible for 2012 dividends.

II. Facts

Mr. Q is serving on active duty in the U.S. Air Force. Mr. Q came to Alaska as a child. He enlisted in the Air Force while he was living in Alaska. Mr. Q's mother lives in Alaska. Ms. Q was born and raised in Alaska. Ms. Q left Alaska to accompany Mr. Q when he was stationed outside the state. Ms. Q's parents now live both in Alaska and Washington State. Mr. and Ms. Q qualified for 2011 PFDs despite being on an absence from Alaska that exceeded five years in duration. The Division would probably have determined that Mr. and Ms. Q were also eligible for 2012 PFDs, had their total return trips to Alaska equaled at least 30 days in the five years prior to 2012. Mr. and Ms. Q's return trips to Alaska totaled only 13 days in the five years prior to 2012. Their failure to return to Alaska more frequently in the past five years is in part due to medical problems that Mr. Q experienced, and in part to being stationed in Germany for four years and other deployments. The Qs also used some of their vacation time in visits to Washington to visit Ms. Q's parents and to meet up with Ms. Q's sister who was visiting from her home in Australia. [2]

Mr. and Ms. Q both lived in Alaska for over ten years before their left, but they had been absent just under ten years by the end of 2011. Mr. Q explained that he recently trained and became

---

[1] In the Matter of F and S Q Decision and Order was issued and distributed to the parties. The Division filed a proposal for action before the proposed the decision was adopted. The Division asked that typographical errors discovered in the proposed decision by corrected. Therefore, this corrected decision is issued in place of the original proposed decision under the authority of 2 AAC 64.350(a).

[2] Recording of Hearing.

a recruiter, and got a new assignment in Washington State. Mr. Q explained that they requested the Washington assignment because it is closer to Alaska and will make returns easier. Mr. Q explained that he would not qualify to be a recruiter in Alaska until he was a more experienced recruiter. [3]

Mr. and Ms. Q plan to move back to Alaska after this tour of duty or after Mr. Q retires from the Air Force. Mr. Q will not be able to retire for another ten years. Mr. and Ms. Q have maintained most of their legal ties to Alaska. They own a home in Virginia that is currently off the market in preparation for their move to Washington. During one of their return visits to Washington in the last five years, Mr. Q only took leave to go help the rest of the family get a return flight. [4]

III. Discussion

A person who has been allowably absent for more than five years is, by law, presumably not an Alaska resident anymore.[5] If an applicant attempts to overcome this presumption, the Division may rely on the following factors when making a decision[6]:

> (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

---

3 Recording of Hearing.
4 Recording of Hearing.
5 15 AAC 23.163(f).
6 15 AAC 23.163(g).

> (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."[7] 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 he or she is no longer an Alaska resident.[8] 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.[9]

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.

Mr. and Ms. Q were credible witnesses. Mr. and Ms. Q admitted that any plans to move back to Alaska are contingent on Mr. Q's assignments on military service, because he is not eligible to retire for another ten years.

Mr. and Ms. Q missed the 30 day measure partly due to Mr. Q's medical problems and because of the family's extended tour in Germany, but a part of the reason they have been spending less time in Alaska during the past few years appears to be that Ms. Q's parents now split their time between Alaska and Washington. There is not sufficient evidence in the record to find that unavoidable circumstances prevented Mr. and Ms. Q from being in Alaska for the 30 days. This is not a case where Mr. and Ms. Q planned visits to Alaska that would have been 30 days in total, but had to cancel or cut one of these visits short due to unforeseen circumstances.

The 30 day presumption does not apply at all when the failure to return is due to unavoidable circumstances.[10] 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.[11]

---

7 15 AAC 23.163(h)(1).
8 15 AAC 23.163(h)(2).
9 15 AAC 05.030(h).
10 15 AAC 23.163(h)(2).

The unavoidable circumstances exception does not include circumstances such as the Qs', whose circumstances were the type of unusual circumstances that one would not expect would prevent an Alaskan resident from returning for 30 days in five years. Mr. and Ms. Q did not plan return visits that would have brought them back for more than thirty days. Instead, they fell very short of the expected 30 day test because a large number of days of their planned return visits to the western U.S. were spent in Washington State rather than Alaska. This is understandable, given Ms. Q's parents' decision to live in that state part of the year, but her parents' ties to Washington State seem to have decreased Mr. and Ms. Q's ties to Alaska as well.

Mr. and Ms. Q's evidentiary burden is to rebut both 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 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.[13] The evidence of Mr. and Ms. Q's commitment to move back to Alaska was not persuasive enough to tip the scale back in their favor.

Mr. and Ms. Q have not shown that they maintained the intent to return to Alaska and maintain a home indefinitely during their extended absence. Mr. and Ms. Q make return visits to Alaska, but fell significantly short of being in Alaska for 30 days in the five years before 2012. The evidence in this case shows that this shortfall in the number of days that Mr. and Ms. Q were in Alaska over the past five years is likely the result of a decrease in their commitment to move back to Alaska. Mr. and Ms. Q have maintained some ties to Alaska, but they have also established significant ties to Virginia and Washington States. This case does not qualify as a very rare exception to the rule requiring the department to "generally" consider that a person who has not

---

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

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

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

returned to Alaska for more than thirty days in five years has not rebutted the presumption that the person is no longer an Alaska resident.

IV. Conclusion

Considering all of the evidence in this case, I find that Mr. and Ms. Q have not rebutted the presumption that they no longer have the intent to return to Alaska to remain indefinitely. During their lengthy absence, Mr. and Ms. Q have not remained Alaska residents. Mr. and Ms. Q are not eligible for 2012 permanent fund dividends.

DATED this 3rd day of May, 2013.

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 3rd day of May, 2013.

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

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