

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

In the Matter of:)
)
 M M) OAH No. 13-0655-PFD
) Agency No. 2012-013-5670
2012 Permanent Fund Dividend)

DECISION

I. Introduction

Sergeant First Class M M applied to receive a Permanent Fund Dividends (PFD) for 2012.¹ The Permanent Fund Dividend Division (division) denied his application because SFC M had been absent from the state for more than five years; by regulation he was presumed to no longer intend to return to Alaska and no longer eligible to receive a PFD.

After completing the informal appeal process, the division did not change its determination.² SFC M requested a formal hearing.³ The hearing was held on June 5, 2013. SFC M appeared in person; the division appeared by telephone. Based on the evidence presented, the division's determination is affirmed.

II. Facts

SFC M was born in Alaska on July 19, 1979. He has applied for, and been eligible for, every PFD since 1983 until the denial of his 2012 PFD.

Mr. M enlisted in the army and was stationed out of Alaska from 1997 through June 2001. He returned to Alaska on assignment to Ft. Richardson. He was selected to join the army special forces in 2004, and because there are no special forces in Alaska, SFC M was transferred. Except for short visits, he has been absent from Alaska since March 2004. During the five calendar years⁴ prior the 2012 PFD, SFC M has returned every year, for a total of 19 days:

2007	4 days
2008	3 days
2009	5 days
2010	4 days
2011	3 days

¹ Exhibit 1.

² Exhibit 8.

³ Exhibit 9.

⁴ January 1, 2007 – December 31, 2011.

The duration of these visits were determined by the length of pass SFC M was awarded.⁵ SFC M has not requested leave for several years - not because his leave request would be denied, but because he did not know about the 30 day requirement. Had he known, he would have taken leave to meet the requirement.⁶

SFC M has some ties to Alaska. His family resides in Alaska and he stores some items with them (snow machine, vehicle, furniture). His principal place of residence is Washington, where he is stationed. SFC M plans to retire from the military and return to Alaska.⁷ He has the option of retiring in 2017, but may extend his service. Finally, SFC M is registered to vote in Alaska.

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.⁸ 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.⁹ 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.¹⁰ Several factors are considered when determining whether this presumption has been rebutted.¹¹ One factor is the frequency and duration of return trips to Alaska during the absence,¹² 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 past 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

⁵ M Testimony.

⁶ *Id.*

⁷ *Id.*

⁸ AS 43.23.005(a)(2) & (3).

⁹ AS 01.10.055.

¹⁰ 15 AAC 23.163(f).

¹¹ 15 AAC 23.163(g).

¹² 15 AAC 23.163(g)(2).

circumstances prevented that individual from returning for at least 30 cumulative days during the past five years.^{13]}

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.”¹⁴ 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.¹⁵

B. Unavoidable Circumstances

Because SFC M has not returned to Alaska for a total of 30 days or more between January 1, 2007 and December 31, 2011, it is necessary to determine whether unavoidable circumstances prevented him from returning more often.¹⁶ SFC M admitted that, had he known about the thirty day rule, he would have taken leave so he could meet the requirement. He also testified that he thought he would have been allowed the leave had it been requested. SFC M was not unavoidably absent, but rather his absence was due to not understanding the rules governing the PFD program.¹⁷

C. SFC M’s Intent to Return

SFC M 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.¹⁸ He must rebut both presumptions in order to show that he does intend to return to Alaska and remain indefinitely. Whether SFC M has met his burden of proof is determined by weighing seven regulatory factors.

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

¹³ 15 AAC 23.163(h)(2).

¹⁴ *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).

¹⁵ *In re T. and E. C.*, OAH No. 11-0404-PFD (Dept. of Revenue 2012), page 4.

¹⁶ 15 AAC 23.163(h)(2).

¹⁷ *C.f.: In re I. H.*, 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 (military duty prevented return. Leave denied five times).

¹⁸ 15 AAC 23.163(h)(2).

SFC M was in Alaska for approximately 24 years and absent for 11 years. However, most of the 24 years was as a minor. As a minor, SFC M had little choice over where he would live. For this reason this factor is neutral.

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

SFC M had only returned to Alaska for a total of 19 days during 2007 through 2011.¹⁹ His testimony established that, had he known about the 30 day requirement, he would have taken leave to have met that requirement. Had SFC M done so, he would have been returning, not because he wanted to be in Alaska, but to maintain his PFD eligibility. The pattern of return trips (annual) balanced against the duration result in this factor being weighed as neutral.

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

SFC M 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.*

SFC M has ties outside of Alaska. His principal home is not in Alaska. This weighs against finding the intent to return.

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

SFC M's skill set does not allow him to return to Alaska with the Army. However, because of the nature of his work, this factor is weighed as neutral.

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.²⁰

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

¹⁹ Exhibit 6; Exhibit 2.

²⁰ 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.

SFC M is registered to vote in Alaska and has some belongings stored in Alaska. He has family in Alaska. He owns no property or other permanent structure in Alaska. Overall, this factor is neutral in determining whether SFC M intends to return to Alaska.

When these factors are considered in light of the presumption against finding the intent to return, SFC M has not met his burden of proof.

IV. Conclusion

SFC M has not met his burden of proving by a preponderance of the evidence that he intends to return to Alaska and remain in Alaska indefinitely. Accordingly, for purposes of the PFD program, SFC M has severed his Alaska residency. The division's denial of his application is affirmed.

Dated this 26th day of August, 2013.

Signed

Rebecca L. Pauli

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 September, 2013.

By: *Signed*

Signature

Rebecca L. Pauli

Name

Administrative Law Judge

Title

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