

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

In the Matter of:)	
)	
U N and L L.N,)	OAH No. 13-0809-PFD
and J, C, Y,)	
and M N (Minor Children))	PFD Nos. 2012-028-8211; 2012-
)	042-2141; 2012-028-8228; 2012
<u>PFD Year 2012</u>)	-028-8233; 2012-028-8239; 2012-
)	028-8245

DECISION

I. Introduction

The N family moved to Alaska in late 2003 and left Alaska in May 2006 when Lieutenant Colonel N was assigned to a military base outside Alaska. They continued to consider Alaska their state of residence, and because their reason for being absent from Alaska was allowable, they remained eligible for a permanent fund dividend through 2011. During the five years before 2012, however, the Ns visited Alaska for only 19 days. The Ns infrequent and short visits during those five years supports a presumption that as of 2012, the Ns no longer had the intent to return to and remain in Alaska. The evidence in the record does not rebut that presumption. Therefore, the Permanent Fund Dividend division denied the Ns' 2012 dividend application, and that denial is affirmed.

II. Facts

Lieutenant Colonel U J. N is an aviator and a Commander in the United States Air Force.¹ In December 2003, Colonel N was transferred to Elmendorf Air Force Base in Anchorage.² He and his wife, L, purchased a home in Eagle River, and moved into the home with their two children upon arrival in Alaska. In May 2006, the Ns left Alaska when Colonel N was transferred to Texas because the aircraft that he was qualified to fly was no longer placed at Elmendorf.³

The Ns returned to Alaska twice after they left in 2006. In 2008, they visited in July for 11 days, and during December 2010 to early January of 2011, they spent eight days in Alaska.⁴

¹ Division Exhibit 12 at 4.

² Division Exhibit 13 at 1.

³ Division Exhibit 12 at 4.

⁴ Division Position Statement at 2-3.

They continue to own their house in Eagle River, which they rent to tenants. Colonel and Ms. N have kept their Alaska driver's license, both of their cars are registered in Alaska, and their voter registration is in Alaska.⁵

All members of the N family, which eventually included four children after their youngest was born in Texas, received permanent fund dividends in the years 2005-2011. In 2012—the year in question in this appeal—however, qualifying for the dividend became much more difficult for the Ns. By this time, the Ns had been gone from Alaska for more than five years. As required by regulation, the Permanent Fund Dividend Division takes a much closer look at an absentee's claim of continued residency when the absentee crosses the watershed of five year's absence.

After reviewing the facts relating to whether the Ns had retained the intent to return and remain in Alaska, the division denied the Ns' 2012 dividend applications.⁶ The denial was confirmed after an informal conference.⁷

The N's then filed this appeal to a formal hearing. In the course of this appeal, the Ns elected to forego an oral hearing, and asked that this office decide this case based on "correspondence." In a hearing by correspondence, both the division and the Ns have the opportunity to file written arguments and exhibits that explain their position on whether the Ns should receive dividends. The division's Position Statement and exhibits were filed on July 31, 2013, by Permanent Fund Dividend Specialist Pete Scott. The deadline for the Ns to file written correspondence, July 31, 2013, passed, and no argument or exhibits were ever received from the Ns.

III. Discussion

Although most Alaska residents must be physically present in Alaska for at least 180 days per year in order to qualify for a dividend, a bona fide resident who is absent for one of the "allowable absences" may still receive a dividend even if absent for more than 180 days.⁸ One of the permissible reasons for a resident to be absent from the state is service in the military and being assigned to service outside of the state, or to be a spouse or a dependent of a person who is

⁵ Division Exhibits 7, 12.

⁶ Division Position Statement at 1.

⁷ *Id.*

⁸ 15 AAC 23.163.

in the military.⁹ This provision applied to the Ns for the first five years of their absence from the state, and their hope in this appeal is that they will continue to qualify under this provision.

Under the regulations governing dividend eligibility, however, if a person is absent for more than five consecutive years, the division will presume that person no longer has the intent to return to and remain indefinitely in Alaska.¹⁰ The presumption is rebuttable, meaning that if the applicant comes forward and proves that the applicant has the intent to return and remain in Alaska, the applicant can receive a dividend. The regulations lay out seven different factors for the Department of Revenue to consider in determining whether the applicant has rebutted the presumption.¹¹

One of the factors that the department will consider is frequency and duration of the applicant's visits to Alaska during the time that the applicant was absent.¹² The regulations elevate the importance of this factor above all others. First, the regulations advise that greater weight will be given to individuals who make frequent trips to Alaska.¹³ Second, the regulations add a further caveat that if an individual has not been physically present for at least 30 days during the past five years, the individual will generally not be considered to have rebutted the presumption of non-residency.¹⁴ An individual can rebut this presumption within a presumption, however, by showing that unavoidable circumstances prevented the individual from being physically present in Alaska for 30 days over a five-year period.¹⁵ Yet, as this office has held, the 30-day requirement "makes it extraordinarily difficult for a person who lives outside Alaska and visits fewer than 30 days in five years to retain eligibility for a dividend."¹⁶

Here, Colonel N acknowledged in his correspondence with the division that the 30-day requirement imposes a high hurdle for his family. He quoted from a 2007 decision issued by this office, which also noted that overcoming the 30-day requirement was "extraordinarily difficult."¹⁷ He explained that he and his family made two trips after leaving in 2006, one in

⁹ AS 43.23.008(a)(3).

¹⁰ 15 AAC 23.163(f).

¹¹ 15 AAC 23.163(g).

¹² 15 AAC 23.163(g)(2).

¹³ 15 AAC 23.163(h)(1).

¹⁴ 15 AAC 23.163(h)(2).

¹⁵ *Id.*

¹⁶ *In re D.C.S.*, OAH No. 11-0103-PFD at 3 (Commissioner of Revenue, 2011).

¹⁷ Division Exhibit 12 at 4.

2008, and one in late 2010 – early 2011. And he made a strong argument that his circumstances after June 2011 prevented further travel:

On June of 2011, I was selected to assume the command of the 451st Flying Training Squadron. This is the largest flying training squadron in the Air Force with 120 permanent party and 250 students. I am the sole person in the squadron who holds and administers G-series orders. As such, there are extraordinary pressures on my ability to take leave or to be unavailable in person (or within short notice) during the 2-year command ending July 2013.¹⁸

This is a compelling explanation for his failure to visit Alaska after June 2011. The problem for Colonel N, however, is that his reasons for not having more frequent and longer duration visits *before* he received the command assignment in June 2011 are not nearly as compelling. He explains that his transfer to Florida in the summer of 2009, and subsequent six-month training, prevented additional travel before January 2010.¹⁹ Yet, the Ns' next trip to Alaska did not occur until late December 2010, and then the trip only lasted eight days. Based on this record, the Ns could have returned to Alaska more frequently and for a longer duration by taking advantage of the travel window available in the spring and summer of 2010. Thus, although Colonel N's appointment as Commander in June 2011 might well constitute unavoidable circumstances that prevented travel to Alaska, that appointment only covers a few months out of the time period in question. And taking his six-month training from June 2009 to January 2010 also out of the mix, he and his family still had plenty of time to make a substantial trip to visit their state of residence. The regulations require that their failure to do so must be considered as an indication that they do not have the intent to return and remain in Alaska.²⁰

Turning to the seven factors listed in regulation, the division's Position Statement argues that most of these factors are negative or neutral with regard to the Ns. The division's analysis is supported by cites to the record. And while further analysis or additional facts might move some of the factors from neutral or negative to positive, the Ns elected to not request an oral hearing, and then did not file any opposition to the division's analysis. Thus, based on this record, the regulatory factor analysis plays out as follows:

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Id.

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Id.

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15 AAC

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

The Ns were in Alaska for only two years and four months.²¹ As of December 31, 2011, they had been absent for over five years and seven months. As the division points out, this factor is unfavorable to the Ns' ability to rebut the presumption.

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

Here, the Ns made only two trips in five years. As explained above, their minimal travel to Alaska is unfavorable to their ability to rebut the presumption. This factor is weighted very heavily against the Ns.

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

The division considers this factor negative because Colonel N's statements imply that he is not likely to return to the state until retirement.²² He states that his financial position prohibits retirement any time soon, which supports the division's conclusion that his ability to return is not within his control. This factor is unfavorable to the Ns' ability to rebut the presumption.

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

The division considered this factor neutral, even though the Ns do not own a home outside Alaska and have maintained their Alaska vehicle registrations, voter registrations, and driver's licenses. The record does not discuss non-paper ties like family and friends. Given the apparent lack of paper ties to other states, however, this factor should be considered favorable to the Ns' ability to rebut the presumption, although paper ties are not given as much weight when compared to other factors.²³

²¹ Division's Position Statement at 2.

²² *Id.* at 3-4 (citing to Division Exhibit 12).

²³ *See, e.g., Wilder v. State, Dep't of Rev., Perm. Fund Div.*, 929 P.2d 1280, 1282 (Alaska 1997) ("Sound policy requires more than such 'paper ties' to establish eligibility for PFDs.").

5. The priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel

Colonel N listed Australia as his first preference for an assignment and Alaska as his second. The division considered this negative. Colonel N argues that it shows his commitment to Alaska because, in his view, an assignment to Australia is extremely unlikely (he characterized it as a “pipedream”²⁴). Without further explanation or testimony, however this factor is either unfavorable or at best neutral in the Ns’ ability to rebut the presumption.

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

The division describes this factor as negative because Colonel N has made a career choice to join the Air Force, and that choice, in the division’s view, “will not allow him to reside in Alaska or return to Alaska.”²⁵ Yet, as explained in *In re T. and E. C.*, in applying this factor to a military career, the question is whether an individual’s particular career choice within the military eliminates an individual’s ability to be stationed in Alaska.²⁶ In that case, Ms. C.’s military career had permitted two tours of duty in Alaska, so this factor was found inapplicable.²⁷ Here, there is some evidence that Colonel N’s choice might not be inimical to an Alaska assignment—he was posted to Alaska once, and his early removal from Alaska was the result of an unexpected transfer of his airplane type out of Elmendorf. On this record, however, Colonel N’s command duties and specializations appear to indicate a career choice that makes a return posting to Alaska unlikely.²⁸ Without further development of the record, this factor is somewhat unfavorable to the Ns’ ability to rebut the presumption.

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

The division agrees that this factor is positive, although it discounts the weight given to the Ns’ home ownership because they purchased their home before they established residency in Alaska, making it appear that the purchase was more for investment purposes than because Alaska was their chosen domicile.²⁹ The division is correct that this factor is favorable to the

²⁴ Division Exhibit 10 at 3.

²⁵ Division Position Statement at 5.

²⁶ *In re T. and E. C.*, OAH No. 11-0404-PFD at 9-10 (Commissioner of Revenue 2012).

²⁷ *Id.* at 10.

²⁸ *Cf., e.g., Wilder*, 929 P.2d at 1283 (Alaska 1997) (holding that military member for whom Alaska posting would have been “career damaging” had chosen career that was inconsistent with intent to return to Alaska).

²⁹ Division’s Position Statement at 5-6.

Ns' ability to rebut the presumption, but that only moderate weight should be given to the Ns' ties to Alaska.³⁰

Thus, only two factors—those regarding the ties the Ns have to this state and to other states—have a positive effect on the N's ability to rebut the presumption, and those factors warrant only moderate weight in comparison to the other factors. Therefore, the evidence in this record is not sufficient to rebut the presumption that the Ns' five-year absence from the state shows that they do not have the intent to return and remain in Alaska, particularly in light of the substantial consideration given to the fact that they were not physically present for 30 days during the past five years.³¹

IV. Conclusion

The N family was physically present in Alaska for only 19 days during the five years preceding their application for a 2012 dividend. They have not rebutted the presumption that they no longer have the intent to return and remain in Alaska. Therefore, they are not eligible for a 2012 dividend, and the division's decision is affirmed.

DATED: September 19, 2013

Signed _____

Stephen C. (Neil) Slotnick
Administrative Law Judge

³⁰ *C.f., e.g., In re T. and E. C.*, OAH No. 11-0404-PFD at 10 and n.53 (recognizing that family, social, personal, and cultural ties to Alaska will be given considerable weight even in the absence of home ownership). This record does not establish that the N's have deep ties to Alaska.

³¹ *See, e.g., In re S.H.* Case No. 030093 (Alaska Dep't of Rev. 2003) (denying dividend to Air Force member who had been physically present for 28 days during past five years); *In re K.P.*, OAH No. 09-0274-PFD (Commissioner of Revenue 2009) (denying dividend to military member who had returned for eight days during past five years).

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 24th day of October, 2013.

By: Signed
Signature
Stephen C. Slotnick
Name
Administrative Law Judge
Title

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