

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

In the Matter of)	
)	
E, D, C, and Q S)	
)	OAH No. 15-0616-PFD
)	Agency No. 2014-060-7010/7403
)	2014 Permanent Fund Dividend

DECISION

I. Introduction

On March 31, 2014, E and D S and their two children -- C and Q -- filed electronic applications for the 2014 Permanent Fund Dividend (PFD). On November 28, 2014, their respective 2014 PFD applications were denied. Mr. S requested an Informal Appeal for all the members of his family on December 23, 2014 with the Permanent Fund Dividend Division (Division). The initial denial was upheld, and Mr. S then requested a formal hearing.

The hearing was held on July 16, 2015. E S and his son C appeared in-person, and E S testified on his family's behalf. Bethany Thorsteinson, a PFD specialist employed by the Division, was present telephonically. She represented the Division and testified on its behalf.

This decision upholds the Division's denial of the respective 2014 PFD applications of E, D, C, and Q S because Mr. S did not spend enough time in Alaska over the preceding five years to rebut the statutory presumption that he is no longer a state resident.

II. Facts

The facts in this case are not in dispute. E S has made Alaska his principle home for some time; he has been eligible for, and received, a PFD since 1985.¹ In April 1999, Mr. S joined the military.² Out of the fifteen years he has been in the military, Mr. S has only been unable to return to Alaska during four of those years: 2000, 2009, 2012, and 2014.³

In recent years, Mr. S was deployed to Iraq in 2008 and to Afghanistan in 2009 through 2010.⁴ In 2012, he received orders to go to Colorado Springs, Colorado for six weeks of military training and simultaneously received "Permanent Change of Station" orders moving him and his

¹ Ex. 4, p. 9; Division Position Statement, p. 1.
² Ex. 4, p. 9.
³ E S' Testimony.
⁴ *Id.*

family to Ft. Leonard Wood, Missouri.⁵ He was due to report to his new duty station in Missouri no later than July 31, 2012.⁶ Upon arriving at the base on July 30, 2012, Mr. S took over a recently vacated position. He testified that it would have been unrealistic for him to take leave during his first month at his new job.⁷ Furthermore, Mr. S testified that he was ordered to take more training from September to October of 2012.⁸ After that, Mr. S did not take leave during the remainder of calendar year 2012 to return to Alaska.⁹ Mr. S testified that while he could have taken leave to visit Alaska in the fall of 2012, he typically goes to Alaska in the summer with his family.¹⁰ Travelling in the fall of 2012 would have been difficult, he testified, because he had a son in a new school, he was working at a new job, he and his wife had a one-year old child, and his wife worked as a school bus driver.¹¹

During the years from 2009 to 2013, Mr. S spent the following time in Alaska: August 14, 2010 to August 21, 2010, August 15, 2011 to August 21, 2011, and July 17, 2013 to July 30, 2013.¹² Altogether, Mr. S spent 26 days in Alaska during the preceding five years before Mr. S applied for the 2014 PFD.

III. Discussion

The issues presented here are whether the 2014 PFD application of E S was correctly denied and, if so, whether D, C, and Q S' respective 2014 PFD applications were also correctly denied.

In this appeal, Mr. S has the burden of proving that the Division erred in its denial of his 2014 PFD application.¹³ Under AS 43.23.008(d), the department will presume that an individual who has been absent from the state for more than 180 days in each of the five preceding qualifying years is no longer a state resident.¹⁴ In order to rebut that presumption, Mr. S needs to prove, by clear and convincing evidence, that he was physically present in Alaska for at least 30 cumulative days during the past five calendar years -- here, the years from 2009-2013.¹⁵ D, C, and Q S' respective claims are dependent upon the validity of Mr. S' claim: each of them can

⁵ Ex. 4, p. 9.

⁶ *Id.*

⁷ E S' testimony.

⁸ *Id.*

⁹ *Id.*

¹⁰ E S' testimony.

¹¹ E S testimony.

¹² Ex.7, p. 1. The day a person arrives in Alaska is not counted unless the person previously left Alaska that same day. See 15 AAC 23.163(j).

¹³ 15 AAC 05.030(h).

¹⁴ As 43.23.008.

¹⁵ AS 43.23.008(d).

only be eligible for the 2014 PFD by virtue of their status as family members accompanying another potentially eligible resident (*i.e.*, E S) with an excusable absence.¹⁶

A. E S' Eligibility

The qualifying year for the 2014 dividend was calendar year 2013.¹⁷ To continue to be considered a state resident, an individual absent from the state for more than 180 days in each of the five preceding qualifying years must meet two requirements.¹⁸ First, the individual must be physically present in the state for *at least* 30 cumulative days during the past five years.¹⁹ Second, the individual must be physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055 or, if not physically present in the state, must intend to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055.²⁰

The first requirement only looks at whether the number of days an applicant has been physical present in the state total at least 30 days during the preceding five years. An applicant could have a legitimate excuse five years in a row for his or her absences from Alaska, but if he or she was not present in the state at least 30 days during those years, the applicant will nevertheless lose Alaskan residency for PFD purposes, and therefore become ineligible to receive a PFD.

The narrow scope of the statute does not allow for other factors to mitigate the 30 day requirement. This “bright line” rule is the result of legislation which codified a previous regulation into a statute.²¹ When the 28th Legislature enacted this legislation,²² it removed the clause from the regulation that allowed an individual to receive a PFD 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.”²³

By striking this section from the new law, the legislature clarified its intent to make the 30-day requirement inflexible.

It is uncontested that Mr. S does not meet the first statutory requirement of AS 42.23.008(d). Both he and the Division agree that he was physically present in Alaska for only 26

¹⁶ AS 43.23.008(13); *see also* AS 43.23.008(a)(3)(B).

¹⁷ AS 43.23.095(5).

¹⁸ AS 43.23.008(d).

¹⁹ AS 43.23.008(d)(1).

²⁰ AS 43.23.008(d)(2); AS 43.23.095(7).

²¹ Division’s Position Statement, p. 3.

²² 2013 Alaska Sess. L. Ch. 33. §2.

²³ Division’s Position Statement, p.10 (emphasis added).

days during the five years preceding his 2014 PFD application.²⁴ While Mr. S provided sufficient evidence that his employment and family situation reasonably prevented him from returning to Alaska for the necessary four additional days,²⁵ nothing in the statute permits a deviation from the 30-day requirement. Without an explicit statutory exception, the inquiry ends.

Mr. S argues that he is no less qualified as a resident of Alaska in 2014 than he was in 2013, since at that time he had also been absent from Alaska for five years without being physically present for 30 days, yet he was approved for the 2013 PFD. This apparent inconsistency is also clarified by the 2013 legislation, which specified that it “may not be applied to make ineligible any person otherwise eligible for a 2013 dividend under AS 43.23.”²⁶ The legislation then states that the sections are to apply retroactively, beginning January 1, 2013, the qualifying year for the 2014 application.²⁷ When Mr. S applied for the 2013 dividend, the regulation granting an exception for circumstances like Mr. S’ situation was still in effect.

Accordingly, 2014 was the first year the mandatory requirement of spending 30 cumulative days in Alaska during the preceding five years was applied to applicants living outside of the state for more than 180 days in each of the five preceding qualifying years. It was, therefore, the first time Mr. S could have been precluded from receiving a PFD due to his extended physical absence from the Alaska. Because Mr. S was not in Alaska for at least 30 cumulative days during the past five years, Mr. S does not meet the first requirement and thus is unable to rebut the presumption that he is no longer an Alaska resident for PFD purposes.

It should be noted that Mr. S provided more than adequate evidence to meet the second requirement: his intent to return to the state and remain indefinitely.²⁸ The S have gone to great lengths to maintain their state voting rights, they have their vehicles licensed in Alaska, and make a near-annual trip to Alaska in the summer.²⁹ However, under the current law, without meeting the first requirement, Mr. S cannot refute the Division’s presumption that he is no longer a state resident.

Mr. S has, therefore, not met his burden in refuting the Division’s presumption, and thus is no longer a state resident for purposes of PFD eligibility.

²⁴ Bethany Thorsteinson’s Testimony; E S’ Testimony.

²⁵ Ex. 6, pp. 9-11.

²⁶ 2013 Alaska Sess. L. Ch. 33, §6.

²⁷ 2013 Alaska Sess. L. Ch. 33, §2 (transition notes).

²⁸ Ex. 6, pp 5-8.

²⁹ E S’ Testimony.

B. D, C and Q S' Eligibility

D, C, and Q S, like E S, were absent from the state more than 180-days in the qualifying year (2013) and thus would not normally be eligible for the 2014 PFD.³⁰ However, they each can still qualify for the 2014 PFD if they are the spouse or minor dependent of an individual who is eligible for a current year dividend.³¹ Because E S is no longer an Alaska resident for PFD purposes, he is not eligible for the dividend.³² As a result, D, C, and Q were not accompanying an eligible resident during the qualifying year and are, therefore, also ineligible.

IV. Conclusion

Because of his extended absence, Mr. S is not eligible for the 2014 PFD. As a result, D, C, and Q S are also not eligible for the 2014 PFD.

The decision of the Permanent Fund Dividend Division to deny the application of the S household for 2014 Permanent Fund Dividends is AFFIRMED.

DATED: August 14, 2015.

By: Signed
Kathleen A. Frederick
Chief 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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 18th day of September, 2015.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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

³⁰ 15 AAC 23.163(b)(1).

³¹ AS 43.23.008(a)(13); *see also* AS 43.23.008(3).

³² AS 01.10.055(c).