

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

In the Matter of)	
)	
M N)	OAH No. 15-1370-PFD
_____)	Agency No. 2014-048-7116

DECISION AND ORDER

I. Introduction

The Permanent Fund Dividend Division denied M N’s application for a 2014 Permanent Fund Dividend (PFD) on the basis that Ms. N had previously severed her Alaska residency while living out of state during more than a decade of military service, and she was therefore required to reestablish residency before receiving a PFD. Ms. N appealed. Based on the evidence presented, the Division’s decision is affirmed.

II. Facts

A. Background of Ms. N’s Work and Residence History

M N moved to Alaska at age ten, and remained in Alaska through high school.¹ In 2000, at age 18, Ms. N left Alaska to begin a military career with the Air Force.² Her parents and sister have remained in Alaska.

Ms. N was stationed outside of Alaska from 2000 through 2013, and was stationed abroad for the first seven of those years. From August 2000 through September 2003, she was stationed in Japan. She was then stationed in Guam until December 2004, when she moved to England. She was stationed in England until March 2007, when she returned to the U.S.

After returning to the U.S., Ms. N was first stationed in Biloxi, Mississippi. She married in August 2009. She remained in Mississippi while her husband deployed in 2009, and afterwards for training. Ms. N was deployed to Guantanamo Bay from July 2010 through February 2011. Because her husband was then stationed in San Antonio, Texas, she

¹ Ex. 3, p. 2. Ms. N received every PFD from 1991 through 2000. Ex. 1, p. 5.

² Ex 3, p. 3; testimony of Ms. N.

then moved to San Antonio after returning from deployment.³ The Ns bought a home in Texas, although Ms. N continued to hold an Alaska driver's license.⁴

Ms. N's parents and sister have remained in Alaska, and she has returned to visit them periodically. However, during the seven years that she was stationed abroad, she did not return to Alaska during duty assignments, because it was costly to do so. Because trips home were expensive, Ms. N limited her visits to times between assignments.⁵ As a result, for a five-year period between January 1, 2004 and December 31, 2008, she visited Alaska only twice, spending a total of just 23 days in the state.⁶ In the years that followed, Ms. N visited slightly more often, but still not even annually. After not visiting during 2008, Ms. N visited Alaska for two weeks during the summer of 2009, and then not again until 2011.⁷ She visited for nine days in 2011, and then did not return again until 2013, when she visited twice for a total of 24 days.⁸

Military members are able to request particular duty assignments, and to rank possible assignments in order of preference. Early in her career, Ms. N wanted to see more of the country and the world, and she requested duty assignments accordingly. She always included Alaska on her list of preferences, but for a long time it was not her first choice, because she wanted to see more of the world before someday returning to Alaska.⁹ The record is unclear as to when exactly Ms. N began listing Alaska as her first choice for duty assignments, but she definitely did not do so prior to 2010.¹⁰ In November 2013, Ms. N and

³ Testimony of Ms. N; Ex. 5, p. 3.

⁴ Ex. 3, p. 3.

⁵ Testimony of Ms. N.

⁶ Ex. 9, p. 1. Testimony of Ms. N.

⁷ Ex. 3, p. 2; Ex. 5, p. 2.

⁸ Ex. 3, p. 2. In summary, Ms. N did not visit Alaska at all in 2005, 2006, 2008, 2010, or 2012; in 2004, 2007, 2009, and 2011, she made one visit per year, typically staying about 10 days each time. *See* Ex. 3, p. 2; Ex. 7, p. 2; Ex. 5, pp. 2-3; Ex. 10, p. 1; Ex. 12.

⁹ Ex. 10, p. 2.

¹⁰ Compare Ex. 3, p. 3 ("I applied for and received orders to AK in Nov. 2013;" "*Recently* I applied for and received a military assignment back home to AK") (emphasis added); with Testimony of Ms. N (indicating she began listing Alaska "about 2010"). Additionally, once Ms. N married in 2009, her husband's seniority meant that his assignments took precedence in terms of where the family would live. Testimony of Ms. N.

her husband received orders for an assignment in Alaska.¹¹ She returned to Alaska in February 2014 to begin that assignment.¹²

B. Ms. N's PFD Application History

After leaving Alaska in 2000, Ms. N received a PFD each year through 2006.¹³ In a filing related to her 2006 PFD application, Ms. N indicated she had been requesting duty assignments outside of Alaska because she “wanted to see a bit more of the world and states before I end my enlistment and settle back in AK.”¹⁴

Ms. N did not apply for a PFD in 2007 because she “had not returned home in over 2 years and knew [she] would not be eligible based off of the established criteria.”¹⁵ She did apply for and receive a PFD in 2008.¹⁶

However, when Ms. N applied for a PFD in 2009, her application was denied based on the then-applicable “five-year rule,” which provided that an individual who had been absent from Alaska for “five consecutive years is presumed not to have the intent to return to Alaska and remain indefinitely in Alaska.”¹⁷ The rule further specified that, where a person has been present in the state for fewer than thirty days over the prior five years, there would be a strong presumption against such an intent, unless that absence was caused by “unavoidable circumstances.”¹⁸

Because Ms. N had visited Alaska only twice, for a total of just 23 days, in the preceding five-year period, the Division denied her 2009 application on the basis that she had severed her residency.¹⁹ Ms. N did not appeal this determination.²⁰

Ms. N also applied for the PFD in 2010, and was again denied.²¹ She did not appeal the 2010 denial, believing she lacked “sufficient justification” to do so because she had not

¹¹ Testimony of Ms. N.

¹² Ex. 3, pp. 1, 3.

¹³ Ex. 1, p. 5.

¹⁴ Ex. 10, p. 2.

¹⁵ Ex. 12.

¹⁶ Ex. 1, p. 5.

¹⁷ Ex. 9; 15 AAC 23.163(f)-(h).

¹⁸ 15 AAC 23.163(h)(2).

¹⁹ Ex. 9.

²⁰ Ms. N was deployed to Guantanamo Bay at the time and “this was probably not the number one thing on [her] mind while [she] was over there.” Testimony of Ms. N.

²¹ Ex. 14, p. 2.

been back to Alaska in two years.²² Ms. N did not apply for the PFD in 2011, 2012 or 2013.²³

In March 2014, after relocating back to Alaska the previous month, Ms. N applied for the 2014 PFD.²⁴ In December 2014, Division requested that Ms. N submit documentation relating to her extended absences from the state.²⁵ In a “Prior Year Non Filer” form submitted in January 2015, Ms. N explained that she had not applied for the PFD during 2013 because she “was previously denied due to not returning for too long (due to military obligations).”²⁶ Ms. N indicated that she had not visited Alaska at all between 2010 and 2012 “due to military deployment and a military PCS relocation,” but had visited twice in 2013 (from February 27 through March 10, and again from March 19 through March 30).²⁷ On her Extended Absence Questionnaire, Ms. N indicated she had “applied for and received Order to AK in Nov. 2013,” arriving back in Alaska in February 2014.²⁸ She urged that her absence should be considered allowable because she had “maintained AK as my home of record, maintained an AK driver’s license and regularly returned almost yearly for the past 15 years.”²⁹

The Division denied Ms. N’s application for a 2014 PFD on March 6, 2015.³⁰ Ms. N requested an informal appeal on April 2, 2015, arguing that, “as an active duty military member I should not lose residency status as a result of being absent for 180 days. I have been on Active Duty status since Jan. 2000.”³¹ Ms. N’s informal appeal focused on absences from Alaska between 2008 and 2011. Ms. N also argued that not having applied for Dividends in prior years should not “place [her] PFD residency status in jeopardy.”³²

²² Ex. 5, p. 3 (“I did not appeal this decision because I genuinely hadn’t been home in 2 years, didn’t think I had sufficient justification.”)

²³ See Ex. 1, p. 5.

²⁴ Ex. 1.

²⁵ Ex. 1, pp. 6-7.

²⁶ Ex. 3, p. 1.

²⁷ Ex. 3, p. 1.

²⁸ Ex. 3, p. 3.

²⁹ Ex. 3, p. 3. Ms. N acknowledged not owning a home in Alaska (having been 18 years old when she last lived in the state), and owning a home in Texas, but argued that the home in Texas “is an investment property and is being leased.” Ex. 3, p. 3.

³⁰ Ex. 4.

³¹ Ex. 5, p. 2.

³² Ex. 5, p. 3. Ms. N’s informal appeal incorrectly asserted that since 1991 she had “received all dividends until my 2010 denial.” See Ex. 5, p. 2. This was incorrect, as described above.

An informal appeal decision issued September 2, 2015 upheld the denial on the basis that Ms. N had severed her residency by 2009 and had not returned in time to reestablish her residency for purposes of PFD eligibility in 2014.³³ Ms. N then requested a formal hearing.³⁴

The telephonic hearing was held on December 3, 2015. Ms. N represented herself and testified on her own behalf. Pete Scott represented the Division. All exhibits offered were admitted. The record was held open for written closing arguments, after which the matter was taken under advisement.

III. Discussion

PFD eligibility turns on an applicant's residency status and physical presence in Alaska during the qualifying year – that is, during the year immediately preceding that for which the PFD is sought. The qualifying year for the 2014 PFD was 2013. In order to be eligible to receive a 2014 PFD, Ms. N needed to be an Alaska resident at the start of 2013, and either physically present in the state or absent for only one of the specifically allowable reasons identified in the PFD statute and regulations.

The Division contends that Ms. N is not eligible for a 2014 PFD because, by 2013, she was no longer an Alaska resident. As such, she needed to reestablish her residency before being eligible to receive a PFD. Ms. N argues that her residency was never severed. As the party who requested the formal hearing, Ms. N has the burden of proving that the Division's decision was in error.³⁵

A. Was Ms. N's Alaska Residency Severed Prior to Her Return to Alaska in 2014?

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.³⁶ For PFD purposes, an applicant who has been absent from the state for more than five years is presumed to no longer be a state resident.³⁷ Ms. N was found to be

³³ Ex. 6.

³⁴ Ex. 7.

³⁵ 15 AAC 05.030(h).

³⁶ AS 01.10.055.

³⁷ AS 43.23.008(d).

ineligible for a PFD in 2009 based on a finding that she was no longer a state resident – that is, that she had not demonstrated an intent to return to Alaska and remain indefinitely.

The 2009 decision was based on a conclusion that Ms. N’s absences from Alaska in the preceding five years did not satisfy the five-year rule. The regulation in effect for the 2009 through 2013 dividend years identified seven factors for consideration in determining whether an individual had retained, at all times during the absence or absences, an intent to return to Alaska and to remain indefinitely.³⁸ Particularly significant among these is the frequency and duration of return trips to Alaska during the absence.³⁹ Prior decisions have observed that it is particularly difficult to overcome the presumption against residency 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 circumstances prevented that individual from returning for at least 30 cumulative days during the past five years.^[40]

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.”⁴¹ It has been observed that this regulation:

[P]rovides a kind of yardstick for measuring the likelihood that a person consistently maintains intent to move back to Alaska during an extended absence. While it does not create an absolute rule that those who do not return for at least thirty days in the past five years are not eligible, it is a rare case when an applicant will be able to present persuasive evidence of intent to return to Alaska that will overcome this presumption. The 30-day rule helpfully provides a test for measuring a person’s probable subjective intent in the context of their maintenance of Alaska residency during an extended absence.

³⁸ 15 AAC 23.163(f), (g). Because the Division alleges that Ms. N severed her residency during this time frame, her contacts with Alaska are examined here under the regulations in effect during that time.

³⁹ 15 AAC 23.163(g)(2).

⁴⁰ 15 AAC 23.163(h)(2).

⁴¹ *In re: J. and M. P.*, OAH No. 11-0353-PFD (Dept. of Revenue 2011), p. 3.

Such a yardstick is particularly helpful where, as here, the issue is not whether Ms. N eventually returned (she did, in 2014), but whether she had consistently retained the intent to return during the lengthy absence that predated that eventual return.

1. Were Ms. N’s Pre-2009 Absences Due to Unavoidable Circumstances?

Because Ms. N did not return to Alaska for a total of 30 days or more in the five years before January 1, 2009, it is first necessary to determine whether unavoidable circumstances prevented her from returning more often.⁴² Ms. N testified that she did not return more often because it was very expensive to do so while she was living overseas. But prior decisions have squarely established that practical difficulties and expense do not constitute “unavoidable circumstances” preventing more frequent returns.⁴³

Ms. N also argued that, had she known about the thirty-day rule, she would have visited for longer periods of time so she could meet the requirement. Ms. N’s own testimony that she could have spent more time in Alaska establishes that her failure to reach the thirty-day threshold was not “unavoidable.”

2. Has Ms. N Overcome the Presumption that, as of 2009, she Lacked the Intent to Return and Remain Indefinitely?

As described above, the regulations in effect during Ms. N’s extended absences establish two related presumptions against eligibility for an applicant who has lived outside of Alaska for more than five years. First, if an applicant has been living elsewhere for more than five years, there is a presumption under 15 AAC 12.163(f) that the person no longer intends to return to Alaska and remain indefinitely. Additionally, if such a person has also not spent at least thirty days in the state in the last five years, there is strong presumption under 15 AAC 12.163(f) that the person lacks the intent to return and remain indefinitely. “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.”⁴⁴

Ms. N has not shown that unavoidable circumstances prevented her return for at least 30 days between the beginning of 2004 and the end of 2008. Thus, there is a strong initial

⁴² 15 AAC 23.163(h)(2).

⁴³ See *In re: K. P.*, OAH No. 09-0274-PFD (Dept. of Revenue 2009); *In re: S. H. et al.*, Caseload No. 030093 (Alaska Dep’t of Revenue 2003).

⁴⁴ *In re: D. E. B.*, OAH No. 09-0437-PFD (Dept. of Revenue 2009), p. 2.

presumption that she *has not* rebutted the presumption that, by 2009, she was not intending to return and remain indefinitely.⁴⁵ In order to prove that she did not sever her residency at that time, she is required to prove that, in 2009, she did in fact intend to return to Alaska and remain indefinitely. Whether she has met her burden of proof is determined by weighing the regulatory factors set out in 15 AAC 23.163(g).⁴⁶

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

Ms. N lived in Alaska for approximately nine years before departing at the start of her military career. By 2009, she had been absent for an equally long period of time. Additionally, the nine years that she spent in Alaska before embarking on her military career were years that she was a minor, with no actual choice over where she would reside. This factor is, at best, neutral.⁴⁷

b. The frequency and duration of return trips to Alaska during the absence.

Ms. N returned to Alaska for a total of 23 days from 2004 through 2008. Although she has described her visits as returning “almost annually,” during the five-year period in question, she returned only twice.⁴⁸ Ms. N testified that, had she known about the 30-day requirement, she would have extended her trips in order to meet that requirement. But, “had [she] done so, [s]he would have been returning, not because [s]he wanted to be in Alaska, but to maintain [her] PFD eligibility.”⁴⁹ The question is not how many days might Ms. N have otherwise spent in Alaska to preserve her technical PFD residency status, but how many days did she, in fact, spend in Alaska because of an intent to return and remain indefinitely.⁵⁰

⁴⁵ 15 AAC 23.163(h)(2).

⁴⁶ In deciding whether the applicant has overcome the presumption against ineligibility, all the factors in 15 AAC 23.163(g) must be considered even when unavoidable circumstances have not been shown. *In re: T. and E. C.*, OAH No. 11-0404-PFD (Dept. of Revenue 2012), p. 4.

⁴⁷ *C.f. In re: T. & D. G.*, OAH No. 11-0349-PFD (Dept. of Revenue 2011), p. 4 (where length of absence has exceeded time spent in Alaska, factor weighs against finding an intent to return and maintain a residency indefinitely).

⁴⁸ Ms. N likewise returned to Alaska only twice in the five years preceding the 2010 dividend year, when her application was again denied.

⁴⁹ *See In re: M. M.*, OAH No. 13-0655-PFD (Dept. of Revenue 2013) Ms. N spent even less time in Alaska over the five years in question than did the applicant whose PFD denial was upheld in *M. M.*

⁵⁰ *See T. and E. C.*, OAH No. 11-0404-PFD (Dept. of Revenue 2012), p. 7 and fn. 45 (distinguishing between visits “made merely for purposes of meeting eligibility requirements” from those made “out of a desire to return for personal reasons”).

Ms. N argues also that it is unfair to hold her infrequent trips against her because she came back to Alaska as often as was practicable given that she was stationed abroad and tickets back to Alaska were expensive. As discussed above, however, the high cost of return trips to Alaska does not mitigate against the infrequency of such trips in the analysis of whether an individual's actions have reflected an intent to return to Alaska and remain indefinitely.

Because the regulation gives greater weight to the claims of an individual who makes frequent voluntary return trips to Alaska during the period of the individual's absence, and particularly given the strong presumption attached to the requirement of returning for at least thirty days during a five-year period, this factor weighs against finding an intent to return.⁵¹

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

The Division correctly argues that this factor weighs against Ms. N's application. By 2009, any plans of returning to Alaska were conditioned upon a number of competing forces, including Ms. N's husband's career, and both spouses' military deployments, neither of which were within Ms. N's control. Further, to the extent to which Ms. N could have influenced her return, e.g. by listing Alaska as her preferred work location, she purposefully did not take those steps because she preferred, not unreasonably, to travel the world. This factor weighs against finding that, in 2009, Ms. N was intending to return to Alaska and remain indefinitely.

d. Any times the individual has established ties outside of Alaska, such as maintenance of homes . . . in another state.

There is little evidence in the record as to the status of Ms. N's ties to other states during her five-year absence between 2004 and 2008.⁵² Given that Ms. N was mostly stationed abroad during this time period, and then moving around for duty and education assignments, and given the absence of evidence of strong ties to any other state during this time, this factor is viewed as neutral or slightly favoring an intent to return.

e. The priority given to employment assignments in Alaska.

⁵¹ 15 AAC 23.163(h).

⁵² Ms. N and her husband eventually bought a home in Texas, but this occurred after the five-year period in question. Accordingly, it is not considered in the analysis of whether Ms. N's residency was severed by 2009.

During the five years in question, Ms. N was not listing Alaska as her first choice for duty assignments, and had never done so. This factor weights against finding an intent, in 2009, to return to Alaska and remain indefinitely.

f. Career choice.

This factor asks “whether an individual has made a career choice that does not allow the individual to reside in Alaska.” However, the Commissioner has held that this factor was not intended to apply against members of the armed forces “simply because most military assignments are not in Alaska.”⁵³ Accordingly, this factor is viewed as neutral.

g. Ties the individual has maintained in Alaska.

The final factor considers what ties the individual has maintained in Alaska. Ms. N retained an Alaska driver’s license during her absence, but she did not present any evidence of other “paper ties” to the state (such as hunting or fishing licenses, voter registration, membership in Alaska-based organizations, et cetera). She also maintained personal family ties in Alaska. At best, this factor slightly favors an intent to return.

In weighing the 15 AAC 23.163(g) factors to determine whether Ms. N severed her residency during the five-year absence from 2004 through 2008, most factors are neutral or weigh against finding continued residency. Ms. N was a credible witness, and she testified that she has always wanted to return to Alaska. But her actions between 2004 and 2008 did not bear out that subjective intent.

Prior cases have acknowledged “the problem of actually measuring something as ethereal as a person’s probably subjective intent,” and have characterized the yardstick of thirty days in five years as an attempt to provide a “concrete solution” to that problem.⁵⁴ Given the length of her absence from the State and her failure to return for thirty days during the five years in question, Ms. N was required to “present strong objective evidence of the intent to return in order to overcome the double presumption.”⁵⁵ When the above factors are considered in light of the strong presumption against finding the intent to return, Ms. N has not met her burden of proof that she remained an Alaska resident by 2009.

⁵³ See, e.g., *In re: J. and M. P.*, OAH No. 11-0353-PFD (Dept. of Revenue 2011), p. 6; *In re: P. O.*, OAH No. 10-0444-PFD (Dept. of Revenue 2010), at 5.

⁵⁴ *In re: T. & D. G.*, OAH No. 11-0349-PFD (Dept. of Revenue 2011), p. 4, fn. 13.

⁵⁵ *In re: J and MP*, OAH No. 11-0353-PFD (Dept. of Revenue), pp. 6-7.

B. The Effect of Ms. N Having Previously Severed Her Residency

Because Ms. N severed her residency during her extended absence from Alaska, she was not then eligible for a PFD until after she physically returned to Alaska and reestablished residency. An individual may not become a resident while absent from Alaska.⁵⁶ Ms. N did not return to Alaska until February 2014. Because Ms. N was not an Alaska resident during the qualifying year (2013), she was not eligible for a 2014 dividend.

IV. Conclusion

Ms. N has not met her burden of proving by a preponderance of the evidence that her residency remained intact during her protracted absence from Alaska. Having severed her residency by 2009, she needed to reestablish that residency in order to apply to be eligible for the PFD. She had not done so by the time of her application in March 2014. The Division’s denial of Ms. N’s application for a 2014 PFD is affirmed.

Dated: December 22, 2015

Signed
Cheryl Mandala
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 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 15th day of January, 2016.

By: Signed
Signature
Cheryl Mandala
Name
Administrative Law Judge
Title

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

⁵⁶ See 15 AAC 23.143(b) (“An individual may not become a resident while absent from Alaska”).