

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

| | | |
|--------------------------------------|---|---------------------------|
| In the Matter of: |) | |
| |) | |
| T D. G, |) | |
| F L. G, |) | |
| and H, Y, M & T T. |) | |
| G (minors) |) | OAH No. 15-1382-PFD |
| |) | Agency Nos. 2015-032-0912 |
| |) | 2015-032-1165 |
| |) | 2015-032-0954 |
| |) | 2015-032-0984 |
| |) | 2015-032-1008 |
| <u>2015 Permanent Fund Dividends</u> |) | 2015-032-1024 |

DECISION

I. Introduction

This case relates to the 2015 Permanent Fund Dividends (PFD) of Sergeant First Class T D. G and his household, consisting of his spouse F L. G and their four minor children. The Permanent Fund Dividend Division found the Gs ineligible, and it denied their applications initially and at the informal appeal level. Sgt. G requested a formal hearing, which was held before the undersigned on December 11, 2015. Although testimony was taken from Sgt. G at the hearing, there were no disputes between the parties as to the underlying facts. The record was kept open until January 22, 2016 for submission of briefs on a legal issue.¹

The uncontested facts show that Sgt. T D. G is unable to qualify for a 2015 PFD under the absolute, nondiscretionary minimum number of days that an individual must be present in Alaska over a five-year period to retain eligibility. The remainder of the family's *eligibility* depends on his eligibility, and their applications must be denied as well. However, it has been expressly conceded in this case that F, H, M, Y, and T T. G have retained their Alaska residency.²

II. Facts

T D. G became a resident of Alaska in 2002, and F G is a lifelong Alaskan. T D. G began a military career in 2003, after he and F were married.

Sgt. G left Alaska in April of 2009 on military orders, and he was absent from the state for more than 180 days in that year and in each of the succeeding five years (2010, 2011, 2012, 2013, and 2014). In those five years preceding his application for a 2015 dividend, he returned to Alaska

¹ Only the Division submitted a brief.

on three occasions: once just after the turn of the year between 2009 and 2010 (7 days), once over the 2012-13 holidays (9 days), and once at the very end of 2014 (7 days).³ The total is 23 days over the five-year period.⁴ Throughout the period, he was allowably absent from Alaska performing his military service.

There was a change in law during this period. In 2013, the Alaska Legislature changed the rules regarding extended absences from Alaska, so that beginning with the 2014 dividend it became essential to have spent at least 30 days in the state over the last five years. Sgt. G was not given notice of this change. Had he known that the change was in the offing, he could have spent longer in the state on his 2012-13 leave block.⁵

In January of 2014, Sgt. G learned of the change in law.⁶ After that, he had other responsibilities that prevented immediate leave to Alaska, including a deployment to Afghanistan that ended in November 2014. Upon his return, he wanted to take leave to Alaska, but could not do so, under army regulations, until certain other responsibilities were completed. He could not get to Alaska until seven days before the year ended, which was too late for him to achieve the 30-day threshold for the 2010-2014 period.⁷

Apart from the 30-day issue, Sgt. G maintains strong ties to the state. Notably, he was an Alaskan before he joined the military. He owns real estate and pays property taxes here, votes here, and maintains his professional license here. He has not established residency anywhere else.⁸

F G and the four children were absent from Alaska more than 180 days in 2014, for purposes of accompanying Sgt. G at his duty station. F was born and raised in Alaska, maintains extensive family ties here, and has spent about eight weeks in the state in the last five years; she is conceded to be an Alaska resident in this case for all purposes. Residency is also not at issue for the children.

Sgt. G was eligible for a PFD in 2014, the year before the dividend at issue in this case.⁹

² The Division made this stipulation on the oral record at the hearing.

³ Exhibit 10.

⁴ This total has been calculated by the method in 15 AAC 23.163(j). Sgt. G was frank at the hearing in stating that he does not dispute that his total number of days in Alaska over the five-year span is less than 30.

⁵ G testimony.

⁶ Ex. 5, p. 3.

⁷ G testimony.

⁸ Ex. 5, p. 3.

⁹ Ex. 1, p. 5.

III. Discussion

A. *T D. G*

To be eligible for a Permanent Fund Dividend, a person must be a state resident at the time of application and during the qualifying year for the dividend in question.¹⁰ In general, a person establishes residency “by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.”¹¹ Once a resident, a person remains so even if absent from the state unless the person “establishes or claims residency” elsewhere or “performs other acts or is absent under circumstances that are inconsistent with the intent” to remain in Alaska and make a home here.¹²

These principles are the end of the residence inquiry for most purposes. “Residency” for PFD purposes is more complicated, however. Since the 2013 statutory changes, the PFD eligibility statutes have provided as follows:

After an individual has been absent from the state for more than 180 days in each of the five preceding qualifying years, the department shall presume that the individual is no longer a state resident. The individual may rebut this presumption by providing clear and convincing evidence to the department that

- (1) the individual was physically present in the state for at least 30 cumulative days during the past five years; and
- (2) the individual is a state resident as defined in [the general definition of residency quoted above].¹³

Since Sgt. G was absent more than 180 days in 2010, 2011, 2012, 2013, and 2014, this statute requires the Department of Revenue to presume him to be a nonresident in 2015, unless he can show that he was present for 30 or more cumulative days during that span of years. Since he cannot do that, the presumption stands and he is not a “state resident” for PFD purposes.¹⁴

Sgt. G contends that the 2013 change was effectively retroactive, in that it changed the legal consequences of his infrequent visits to Alaska in prior years. Indeed, the legislation was explicitly retroactive, containing a retroactivity provision in one of its uncodified sections.¹⁵ He believes this retroactivity is unconstitutional. This argument is beyond the scope of this tribunal. Because the executive branch of government must follow laws enacted by the Legislature, not nullify them,

¹⁰ AS 43.23.005(a).

¹¹ AS 01.10.055(a).

¹² AS 01.10.055(c).

¹³ AS 43.23.008(d) (ch. 33, § 2 SLA 2013).

¹⁴ *See In re D.J.*, OAH No. 15-0737-PFD (Dep’t of Revenue 2015) (confirming that presumption is un rebuttable for individuals who do not have the requisite 30 days; explaining the statutory history that traded

¹⁵ Chapter 33, § 5 SLA 2013 (reproduced at Ex. 11, p. 12).

facial constitutional challenges of statutes are solely the province of the courts, and cannot be addressed at this level.¹⁶

B. F G and Children

To be eligible for a dividend, during the qualifying year an individual must be “physically present in the state or, if absent, . . . absent only as allowed in AS 43.23.008.”¹⁷ The qualifying year for the 2015 dividend was 2014.¹⁸ In 2014, F G and the four children were absent from Alaska for the great majority of the year. The only allowable absence in AS 43.23.008 on which they can potentially rely is the one in AS 43.23.008(a)(3), which preserves eligibility for a spouse or minor dependent who is accompanying “an individual who is (A) serving on active duty as a member of the armed forces of the United States; and (B) eligible for a current year dividend.” The Division concedes that Sgt. G was serving on active duty and that the family was accompanying him.¹⁹ The only question is whether he meets the criterion in (B)—“eligible for a current year dividend.” This, in turn, depends on what is meant by “current year.”

The family was accompanying Sgt. G in 2014, and Sgt. G was eligible for a 2014 PFD. Thus, if “current year” means the qualifying year during which the family was accompanying him, the family is eligible. On the other hand, Sgt. G is not eligible for a 2015 dividend, and so if “current year” means the dividend year at issue, the family is not eligible.

As the Division has ably pointed out in supplemental briefing, this question is answered by looking at the overall pattern of the PFD statutes. The PFD laws refer repeatedly to two kinds of years, “current” years and “qualifying” years. Thus, individuals are permitted in AS 43.23.011 to apply for a “current” year dividend. But when they apply, AS 43.23.005 requires that they have been state residents during the entire “qualifying” year. Of particular relevance, the preamble to AS 43.23.008(a) says that “an individual who is absent from the state during the *qualifying year* remains eligible for a *current year* permanent fund dividend if . . .,” whereupon the various allowable absence categories are listed.²⁰ Thus, when the same statutory sentence reaches the third absence category, AS 43.23.008(a)(3), and refers to “current year dividend”, the context makes it

¹⁶ See *In re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Econ. Dev., adopted Sept. 4, 2009), at 5 (<http://aws.state.ak.us/officeofadminhearings/Documents/TOB/TOB080245.pdf>).

¹⁷ AS 43.23.005(a)(6).

¹⁸ AS 43.23.095(6).

¹⁹ Although Sgt. G was in Afghanistan for part of the year—and his family was not with him there—the word “accompanying” has been interpreted to encompass family members who wait at an out-of-state location while the military member completes such a deployment. See *In re C.D.B.*, OAH No. 10-0054-PFD (Dep’t of Revenue 2010) (<http://aws.state.ak.us/officeofadminhearings/Documents/PFD/PFD100054.pdf>).

clear that the reference is to the dividend year for which the person is seeking to be eligible. Here, that year is 2015, a year in which Sgt. G is not eligible, and hence the allowable absence category is not available to the spouse and dependents who were accompanying him in 2014.

IV. Conclusion

Because of extended absence from the state, the Legislature intended that applicants in the position of Sgt. G would not be eligible for a 2015 PFD, and that an accompanying spouse or dependents would likewise be ineligible. The Department of Revenue has been given no authority to relax the rules that make these individuals ineligible. The decision of the Permanent Fund Dividend Division to deny the applications of T D. G, F L. G, and their four children is **AFFIRMED**.

DATED this 29th day of February, 2016.

By: Signed
Christopher Kennedy
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 25th day of March, 2016.

By: Signed
Signature
Christopher M. Kennedy
Name
Administrative Law Judge
Title

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

²⁰ The italics have been added to the quotation.