

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

In the Matter of)	
)	
E K and)	OAH No. 16-0452-PFD
B H-K)	Agency No. 2015-056-0594/-055-9851
_____)	

DECISION AND ORDER

I. Introduction

Husband and wife E K and B H-K (the Ks) challenge the Permanent Fund Division’s decision denying their applications for the 2015 Permanent Fund Dividend (PFD).

As a matter of law, the Ks are bound by the final judgment denying Mr. K’s 2014 PFD. That judgment included the determination that, because Mr. K had not been physically present in the state at least 30 cumulative days between 2009 and 2013, he was no longer a state resident for PFD purposes. As a result, for purposes of PFD eligibility, Mr. K was not a state resident throughout 2014, the qualifying year for the 2015 PFD. Ms. H-K retained her residency for all purposes; however, she was absent from the state for too many days to qualify for the 2015 PFD, while accompanying her ineligible spouse.

II. Facts

A. Material Facts

There is no dispute regarding the relevant facts of this case. Ms. H-K is a long-time Alaskan. She has been eligible for every PFD from 1982 through 2013.¹ Mr. K has been eligible for dividends from 2001 through 2013.² Two prior Office of Administrative Hearings (OAH) decisions discuss in detail the Ks’ background and history in Alaska through 2013.³

The Ks have been away from Alaska for a number of years due to Mr. K’s service in the U.S. Air Force. The parties agree that, since the Air Force transferred Mr. K out of Alaska in 2001, both Mr. K and Ms. H-K have intended to return to the state and to remain indefinitely, and they have made significant efforts to retain their ties to the state.

¹ Div. Exhibit 2 (re B. H-K), p. 1.

² Div. Exhibit 2 (re E. K), p. 1.

³ *In re E K and B G-K*, OAH No. 12-0129-PFD (Comm. of Revenue July 23, 2012); *In re E K and B G-K*, OAH No. 15-1371-PFD (Comm. of Revenue March 23, 2016).

Between 2010 and 2014, the five years preceding the 2015 PFD, the Ks were absent from Alaska more than 180 days in each year because of Mr. K's military obligations. In 2014, Mr. K was physically present in the state for 32 days, from November 30 through December 31, 2014.⁴ He was out of state from January 1 to November 29, 2014, serving on active duty in the armed forces.⁵ Ms. H-K was physically present in Alaska for 149 days in 2014; she was absent for 216 days. Of her 216 days away, she spent 19 days caring for her father, who required emergency medical care outside the state, and 197 days accompanying Mr. K on his military assignment.⁶

Mr. K officially retired from the Air Force on January 1, 2015. On November 29, 2014, while Mr. K was on terminal leave, the Ks returned to Alaska and moved back into the home that Ms. H-K has owned for many years with her parents. They have resided in Alaska since that time.

B. Procedural History

Because of new and more stringent PFD eligibility language that the Alaska Legislature adopted during the 2013 legislative session, the Division denied the Ks' 2014 PFD applications.⁷ It denied Mr. K's application because he had been absent from the state more than 180 days in each of the preceding five qualifying years, from 2009 through 2013. In addition, he had been physically present in Alaska fewer than 30 days during that time. Therefore, even though Mr. K could show clear and convincing evidence of his intention to return to Alaska and to remain indefinitely, he could not overcome the statutory presumption in AS 43.23.008(d) that he was no longer a state resident for PFD purposes. As a military spouse, Ms. H-K's eligibility depended on her husband's eligibility. Since he was not eligible for the 2014 PFD, neither was she.

After a formal administrative hearing, an Administrative Law Judge (ALJ) affirmed the Division's decision. The Commissioner of Revenue adopted the ALJ's decision, and it

⁴ Div. Exhibit 1 (re E. K), p. 5. Mr. K returned to Alaska on November 29, 2014. When counting days of presence and absence, Division regulations count whole days. With an exception not relevant here, the day an individual returns to Alaska counts as a day of absence. The day an individual leaves Alaska counts as a day of presence. 15 AAC 23.163(j).

⁵ Div. Exhibit 1 (re E. K), pp. 2, 5.

⁶ Div. Exhibit 1 (re B. H-K), pp. 2, 5.

⁷ See *In re E K and B G-K*, OAH No. 15-1371-PFD (Comm. of Revenue March 23, 2016).

became the final agency action on March 23, 2016.⁸ The Ks have appealed that decision to the superior court, where it is currently pending.⁹

In March of 2015, the Ks filed applications to receive the 2015 PFD.¹⁰ The Division again denied their applications.¹¹ In the Division’s view, for purposes of determining PFD eligibility, the 2014 PFD decision severed Mr. K’s status as a state resident. Because he was no longer a state resident for PFD purposes, he was required to re-establish his residency prior to January 1, 2014, the start of the qualifying year for the 2015 PFD. He returned to Alaska in 2014, but too late to qualify for the 2015 dividend.¹² The Division also denied Ms. H-K’s application because her absences exceeded the allowable absence rules.¹³

The Ks appealed. A formal hearing took place on June 23, 2016. The Ks appeared in person and represented themselves. PFD Appeals Manager Robert Pearson appeared telephonically and represented the Division. The hearing was audio-recorded. All offered exhibits were admitted. The evidentiary record closed at the end of the hearing.

III. Discussion

A. Overview of applicable law

The Division implements the Alaska PFD program pursuant to a statutory regime created by the Alaska Legislature, and further clarified by Department of Revenue Regulations.¹⁴ Among other eligibility requirements, applicants must be state residents during the entire qualifying year for the PFD at issue.¹⁵ For the 2015 PFD, calendar year 2014 was the qualifying year.¹⁶ Applicants also must be physically present in Alaska at all times or, if absent, be absent only as allowed by the “allowable absences” provisions in AS 43.23.008.¹⁷

Turning first to the physical presence requirement, one of the seventeen allowable absence provisions of AS 43.23.008(a) applies to active duty members of the armed forces. The provision also applies to the service member’s spouse, whose absence is allowable as long as he

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Id.

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3AN-16-00000CI.

¹⁰

Div. Exhibit 1 (both cases).

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Div. Exhibit 4 (both cases), Div. Exhibit 7 (both cases).

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Div. Exhibit 7 (re E. K).

¹³

Div. Exhibit 7 (re B. H-K).

¹⁴

See AS 43.23; 15 AAC 23.103 – 23.933.

¹⁵

AS 43.23.005(a)(3).

¹⁶

AS 43.23.095(6).

¹⁷

AS 43.23.005(6).

or she was out of state accompanying the service member *and* the service member is eligible for a current year dividend.¹⁸

As is the case for other allowable absences, this allowable absence is not unlimited. After an individual has been absent from the state more than 180 days in each of the preceding five qualifying years, a presumption arises that the individual is no longer a state resident. The presumption can be rebutted, but only by specific information, which must be established by clear and convincing evidence. Alaska Statute 43.23.008(d) provides:

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. This presumption is rebuttable by clear and convincing evidence that

(1) the individual was physically present in Alaska for at least 30 cumulative days during the past 5 years; and

(2) the individual is a state resident as defined in AS 43.23.095.

As noted above, regardless of physical presence, an individual also must be a state resident for the entire qualifying year. In general, a “state resident” is defined as an individual who is physically present in Alaska with the intent to remain indefinitely, or if not physically present in Alaska, the individual intends to return to the state and remain indefinitely under the requirements of AS 01.10.055.¹⁹

The determination whether an individual intends to return to the state and to remain indefinitely involves a fact-based inquiry.²⁰ There is no need to engage in that inquiry here, because the parties agree that the Ks have always intended to return to the state and to remain indefinitely. That fact is well-established in the two prior OAH decisions regarding the Ks’ 2011 and 2014 PFDs, as well as the evidence they submitted in this case.²¹ It is further evidenced by their move back to Alaska once Mr. K retired from the military.

Nonetheless, there is a special provision in the PFD statute that requires the Department of Revenue to “presume” an individual is no longer a state resident in certain circumstances,

¹⁸ AS 43.23.008(a)(3).

¹⁹ AS 43.23.095(7).

²⁰ See AS 01.10.055; AS 43.23.008(e).

²¹ See, e.g., K Exhibits D-G (2015 federal tax return; DMV records); Div. Exhibit 9 (both cases).

regardless of the person's actual intent.²² This presumption was applied in the March 2016 decision that is now on appeal to the superior court.

B. The Ks' 2015 PFD eligibility

1. Ms. H-K's eligibility

Ms. H-K's status as a state resident for PFD purposes is not in question. She has remained a state resident for all purposes since at least 1982. In 2014, Ms. H-K was absent from the state for 19 days while caring for her critically ill father. This absence is allowable under AS 43.23.008(a)(6). She was absent for 197 days while accompanying Mr. K on his military assignment. This absence exceeded the 45 day limit that otherwise applies,²³ unless Ms. H-K was allowably absent while accompanying her eligible active duty spouse. This decision therefore focuses on Mr. K's eligibility.

2. Mr. K's eligibility

The parties agree that Mr. K was absent for more than 180 days in each of the five qualifying years preceding the 2015 PFD. They also agree that he was present in Alaska for more than 30 days in 2014. As a result, the Division concedes that, if Mr. K was a state resident and eligible for the PFD throughout 2014, he would overcome the statutory presumption in AS 43.23.008(d). In that case, the Ks were allowably absent in 2014 due to Mr. K's military obligations, and they both would be eligible for the 2015 PFD.

The determinative issue is whether Mr. K was a state resident for purposes of PFD eligibility throughout calendar year 2014. The Division contends that the prior administrative decision denying his 2014 PFD necessarily terminated Mr. K's state residency for PFD purposes. This argument involves the doctrine of collateral estoppel, which prevents the re-litigation of issues of fact or law that were actually litigated and necessarily decided in a prior proceeding.²⁴ There are three requirements to determine whether a party is bound by the outcome of a prior adjudication. First, the party against whom collateral estoppel is asserted must be the same as, or in privity with, the party to the earlier case. Second, the issue to be precluded from challenge must be identical to that

²² AS 43.23.008(d).

²³ AS 43.23.008(a)(17)(C).

²⁴ *Harrod v. State, Dep't of Revenue*, 255 P.3d 991 (Alaska 2011); *Wall v. Stinson*, 983 P.2d 736, 740 (Alaska 1999).

decided in the prior case. Third, the issue to be precluded must have been resolved by a final judgment on the merits.²⁵

In this case, the parties in this action are identical to those in the 2014 PFD appeal. The issue is also identical: Is Mr. K a state resident who is eligible for the PFD? Though the year under review is different, Mr. K's eligibility in 2015 depends entirely on whether he was still a state resident for PFD purposes as of January 1, 2014. That issue was necessarily decided in the 2014 PFD appeal. The ALJ in that case concluded that Mr. K could not overcome the presumption because he did not have the required 30 days in Alaska in the preceding five years; therefore, he was "no longer a state resident for purposes of PFD eligibility."²⁶

The third requirement for application of collateral estoppel is also satisfied, since Mr. K received a final judgment after a full and fair opportunity to be heard on the merits of this issue.²⁷ The Department of Revenue has primary jurisdiction to adjudicate PFD appeals.²⁸ Its formal hearing process provides an adequate substitute for judicial procedure, and it can fairly be used to bind those who participated in it.²⁹ The Ks have appealed that decision to the superior court, which will act as an intermediate court of appeal in reviewing the final agency determination.³⁰ In the collateral estoppel analysis, the Commissioner's decision is a final judgment despite the pending appeal.³¹

All of the elements of collateral estoppel are satisfied in this case. Therefore, the parties are bound by the outcome of the 2014 appeal. As a matter of law, and for all subsequent proceedings, the 2014 eligibility decision severed Mr. K's residency for PFD purposes prior to January 1, 2014. That conclusion cannot be re-litigated here. As a result of that decision, Mr. K was not an Alaska resident for purposes of PFD eligibility as of January 1, 2014. He therefore was required to re-establish his Alaska residency for PFD purposes through his physical presence in Alaska, with an intention to remain indefinitely.³²

²⁵ *Harrod*, 255 P.3d at 999-1000.

²⁶ *In re EK and B G-K*, OAH No. 15-1371-PFD, p. 5 (Comm. of Revenue March 23, 2016).

²⁷ *Rapoport v. Tesoro Alaska Petroleum Co.*, 794 P.2d 949, 951-52 (Alaska 1991).

²⁸ See AS 43.23.015(g).

²⁹ *Harrod*, 255 P.3d at 1000. See also *In re T. L.-B.*, OAH No. 09-0401-PFD (Comm. of Revenue Feb. 10, 2010) (formal agency appeal process meets requirements for collateral estoppel); *In re I., P., B., M., K. & L.H.*, OAH No. 08-0210-PFD (Comm. of Revenue Jan. 4, 2010) (collateral estoppel applies to informal agency appeals).

³⁰ AS 43.23.015(g); AS 44.62.560-.570.

³¹ See *Rapoport*, 794 P.2d at 951-52.

³² *Harrod*, 255 P.3d at 1000; *In re M.N.*, OAH No. 15-1370-PFD (Comm. of Revenue Jan. 15, 2016).

He returned to Alaska in late November 2014, and that is when he re-established residency. Based on this return date, Mr. K was not a state resident for PFD eligibility purposes throughout 2014. However, he was a resident throughout calendar year 2015, so the Division acknowledged at the hearing that he is eligible for the 2016 PFD.

The Ks argue that they satisfy all of the PFD eligibility criteria at AS 43.23.005. In addition, Mr. K satisfies the requirements for state residency under both AS 43.23.095 and AS 01.10.055. In their view, the Division's position is inconsistent with the language of those statutes. For instance, under AS 01.10.055(c), once Mr. K established residency in the state, he remained a resident throughout his absences, because he did not establish or claim residency in another state, and he did not perform other acts that are inconsistent with an intention to remain in Alaska indefinitely. Since Mr. K was a state resident under those statutory definitions, and he was present in Alaska for more 30 days in 2014, the Ks argue that he meets all PFD eligibility requirements.

The Alaska Supreme Court heard and rejected the same argument in *Harrod v. State, Department of Revenue*.³³ There, as in this case, the Harrods had not claimed residency elsewhere or acted inconsistently with an intention to return to Alaska and remain indefinitely. Nonetheless, the Court upheld the termination of their residency for PFD purposes because they had not overcome the rebuttable presumption raised by their extended absence from the state. Like Mr. K, they were not eligible for subsequent PFDs unless they reestablished their residency for PFD purposes through their physical presence.

Despite the language of AS 43.23.095(7) and AS 01.10.055, an individual is no longer a state resident *for purposes of PFD eligibility* if he or she cannot overcome the presumption at AS 43.23.008(d). Once that determination is made, it has ramifications beyond the PFD year at issue. It requires that the applicant return to Alaska and re-establish residency for PFD purposes.³⁴ This can only be achieved by the individual's physical presence in Alaska on or before January 1 of the qualifying year, with the requisite intent to remain indefinitely.

IV. Conclusion

Solely for purposes of PFD eligibility, Mr. K's state residency was severed prior to January 1, 2014 because of the final agency adjudication regarding his 2014 PFD application.

³³ *Harrod*, 255 P.3d at 1000.

³⁴ See 15 AAC 23.143(b) (an individual may not become a resident while absent from Alaska); *In re M.N.*, OAH No. 15-1370-PFD (Comm. of Revenue Jan. 15, 2016).

That decision is binding on the parties, and it required Mr. K to re-establish residency before he is eligible for subsequent PFD payments. Mr. K did not re-establish his residency until he moved back to Alaska in late November 2014. Consequently, he was not an Alaska resident for PFD purposes on January 1, 2014, and throughout the qualifying year, and he was not eligible for the 2015 PFD. Because Mr. K was not eligible, Ms. H-K was absent from the state for 197 days while accompanying her ineligible spouse. As a result, she too is not eligible for the 2015 PFD.

The Division's decision denying the Ks' 2015 PFD applications is affirmed.

DATED: July 7, 2016.

Signed
Kathryn A. Swiderski
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 2nd day of August, 2016.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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