

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

In the Matter of)	
)	
N & U M, Y and Z M (MINORS))	OAH No. 16-1086-PFD
_____)	Agency No. 2016-052-6697/6334

DECISION

I. Introduction

Husband and wife, N and U M, and their two minor children Y and Z M, challenge the Permanent Fund Dividend Division’s decision denying their applications for the 2016 Permanent Fund Dividend (PFD).

When the Division denied N, U, and Y Ms’ 2015 PFD applications, it determined that they had been absent from the state more than 180 days in each of the preceding five years, from 2010 to 2014. Over that period, they had not been present in Alaska at least 30 cumulative days. As a result of this extended absence, all of the Ms were ineligible for the 2015 PFD as well as any subsequent PFDs, unless they returned to Alaska and re-established residency through their physical presence. The Ms re-established Alaska residency when they moved back to the state on August 3, 2015. This means they were eligible residents for only part of the 2015 qualifying year, and they were not eligible for the 2016 PFD. The Division’s decision is affirmed.

II. Facts

N and U M became Alaska residents in November 2004, when the U.S. Army transferred N to Base X.¹ Their daughter Y was born in Alaska in 2007.² In March 2009, the Army transferred the family out of Alaska.³ Z was born out of state in 2012.⁴

N M received a PFD every year from 2007 through 2014.⁵ U M received PFDs from 2006 through 2014; Y received PFDs from 2008 through 2014; and Z received the 2013 and 2014 PFDs.⁶ The Division approved these applications because the Ms satisfied all requirements for state residency, and they were allowably absent between 2009 and 2014 due to N’s military service obligations.

¹ Exhibit 1, pp. 1, 6.
² Exhibit 1, p. 11.
³ Exhibit 1, p. 3.
⁴ Exhibit 1, p. 15.
⁵ Exhibit 1, p. 5.
⁶ Exhibit 1, pp. 10, 14, 18.

The Division denied all four of the Ms' applications for the 2015 PFD.⁷ It denied N, U, and Y's applications primarily because they had been absent from Alaska for more than 180 days in each of the five preceding years, from 2010 through 2014, and they had not spent at least 30 cumulative days in the state during those five years.⁸ As a result, they were presumptively no longer Alaska residents. Because Z M was born in 2012, she was not subject to the "five-year rule." The Division found that she was not a state resident during the 2014 qualifying year, and she lacked an eligible sponsor.⁹

N M acknowledged that he, U, and Y had been out of state more than 180 days in each year from 2010 through 2014, and they had not spent 30 cumulative days in Alaska during that time.¹⁰ He acknowledged that Z also had not been physically present in Alaska during this time. For this reason, the family did not contest the denial of their 2015 PFDs.¹¹

The military transferred N M back to Alaska in 2015. The family returned on August 3, 2015, and they have resided in Alaska since that time.¹² In 2015, they were absent from Alaska for 215 days and present in the state for 150 days.¹³

In March 2016, the Ms submitted applications for the 2016 PFD.¹⁴ They asserted that their 215-day absence during 2015 was allowable, since N was stationed out of state on military orders and the family accompanied him on his military business. On April 22, 2016, the Division denied their applications.¹⁵

The Ms requested an informal appeal.¹⁶ Following additional investigation, the Division upheld its earlier decision and again denied the PFD applications.¹⁷ The Ms then requested a formal hearing.¹⁸ The hearing took place on October 28, 2016. N M appeared in

⁷ Exhibit 7, pp. 1 - 20.

⁸ Exhibit 7, pp. 1 - 18. U and Y also had not been physically present in Alaska at least 72 consecutive hours in 2013 or 2014. *Id.* Since N was not eligible for the 2015 PFD, the Division additionally concluded that U and Y were not allowably absent from Alaska while accompanying an eligible active duty service member spouse/parent. *Id.* at 6, 13. Lastly, Y's application was denied for lack of an eligible sponsor. *Id.* at 12.

⁹ *Id.* at 19-20. Z also had not been physically present in Alaska for 72 consecutive hours in 2013 or 2014, and she was not allowably absent accompanying her eligible active duty service member father.

¹⁰ N M testimony.

¹¹ *Id.* Prior to the hearing, the M additionally argued that they did not appeal their 2015 denials because Division representatives advised them not to. Exhibit 4, pp. 5, 15, 22, 27. The M did not pursue this claim at the hearing, and the evidence in the record would not support it. *See* Exhibits 10-11.

¹² Exhibit 1, pp. 4, 8, 13, 16.

¹³ Exhibit 1, pp. 4, 8.

¹⁴ Exhibit 1, pp. 1, 6, 11, 15.

¹⁵ Exhibit 3, pp. 1, 3, 9, 13.

¹⁶ Exhibit 4.

¹⁷ Exhibit 5.

¹⁸ Exhibit 6.

person, represented his family, and testified on their behalf. Peter Scott appeared telephonically and represented the Division. The hearing was audio-recorded. All offered exhibits were admitted into the record. The evidentiary record closed at the end of the hearing.

III. Discussion

The issue in this case is whether the Division properly denied the Ms' 2016 PFD applications. The Ms bear the burden of proving that they were eligible for the 2016 PFD, and the Division made a mistake in denying their applications.¹⁹

A. Overview of Applicable Law

During the 2013 legislative session, the Alaska Legislature enacted a new, bright-line eligibility rule that applies to applicants who have been allowably absent from Alaska for an extended period of time.²⁰ To continue to be considered a state resident, an individual who has been absent from the state more than 180 days in each of the five preceding qualifying years must meet two requirements.²¹ First, he or she must be physically present in the state for at least 30 cumulative days during that five-year period.²² In addition, he or she must be a "state resident" as defined in AS 43.23.095.²³ To establish himself or herself as a "state resident," the applicant must be physically present in the state with the intent to remain indefinitely under the requirements of AS 01.10.055, or, if not physically present in the state, he or she must intend to return and remain indefinitely under the requirements of AS 01.10.055.²⁴

Under the new eligibility rule, once an individual has been absent from Alaska more than 180 days in each of the preceding five qualifying years, the Division must presume he or she is no longer a state resident.²⁵ The burden then shifts to the individual to rebut the presumption by clear and convincing evidence. To do so, the individual must first show that he or she was physically present in the state for at least 30 cumulative days during the preceding five qualifying years.²⁶

¹⁹ 15 AAC 05.030(h).

²⁰ AS 43.23.008(d); 2013 Alaska Sess. L. Ch. 33 § 2.

²¹ AS 43.23.008(d).

²² AS 43.23.008(d)(1).

²³ AS 43.23.008(d)(2).

²⁴ *Id.*; AS 43.23.095(7).

²⁵ AS 23.43.008(d).

²⁶ AS 43.23.008(d) (emphasis added).

If an applicant cannot make this showing, he or she loses state resident status for PFD purposes as a matter of law.²⁷ In such situations, the second showing becomes irrelevant. That is, even if the applicant could provide other evidence to show an intent to return to Alaska and to remain indefinitely, this evidence cannot overcome the statutory presumption severing state residency for PFD purposes.²⁸

B. The Ms' 2015 and 2016 PFD Applications

When the Division denied N, U, and Y Ms' 2015 PFD applications, it concluded that they had been absent from Alaska for more than 180 days in each year from 2010 through 2014, and they were not physically present at least 30 cumulative days during this period. Therefore, under the statutory presumption at AS 43.23.008(d), the Division concluded they were no longer state residents for purposes of PFD eligibility. Y and Z's eligibility also depended on N and U to act as their sponsors.²⁹ When N and U lost their status as state residents for PFD purposes, Y and Z also became ineligible.³⁰

The Ms did not appeal the Division's decision on their 2015 PFD eligibility, and the issue of their state residency was not formally adjudicated at that time. As a result, the Division's 2015 letters of denial do not receive preclusive effect in this case under the doctrine of collateral estoppel.³¹ However, based on the evidence presented in this appeal, it is clear that the Division's conclusions were appropriate.

At the formal hearing in this matter, N M explained that the family did not appeal the 2015 PFD denials because they acknowledged that they did not meet the 30-day requirement.³² They could not have shown that they were physically present in the state for at least 30 cumulative days between 2010 and 2014. He also explained that, in 2014, he and U knew they would be moving back to Alaska in 2015. Given their imminent move, they could not financially justify a 2014 trip back to the state, and they consciously decided not to undertake that effort.³³

²⁷ See *In re E, D, C & QS*, OAH 15-0616-PFD (Comm'r of Revenue, 9/18/15).

²⁸ *Id.*; See also *In re EK & BH-K*, OAH No. 15-1371-PFD OAH (Comm'r of Revenue, 3/23/2016) (superior court appeal pending, 3AN-16-06179CI); *In re EK & BH-K*, OAH No. 16-0452-PFD (Comm'r of Revenue, 8/2/16) (superior court appeal pending, 3AN-16-08636CI).

²⁹ 15 AAC 23.113(b)(1), (e).

³⁰ AS 43.23.005(a); AS 43.23.008(a)(3); AS 43.23.095(7).

³¹ *In re A & JC*, OAH 11-0287-PFD (Comm'r of Revenue, 10/13/2011).

³² N M testimony. See also Exhibit 2, pp. 1-2.

³³ N M testimony. See also Exhibits 10 - 11.

This testimony reaffirms the Division's conclusion that the Ms did not meet the 30-day physical presence requirement between 2010 and 2014. Therefore, by operation of the statutory presumption in AS 43.23.008(d), their status as eligible state residents ended. This event had significance beyond the Ms' 2015 PFD eligibility. Based on the plain language of AS 43.23.008(d), once they were no longer state residents for purposes of the 2015 PFD, they became ineligible for any subsequent PFDs, unless they physically returned to Alaska and re-established residency.³⁴

This result applies regardless of the reason for the Ms' extended absence from the state.³⁵ It also does not change based on other evidence of the Ms' intention to return to Alaska and to remain indefinitely.

The Ms argue that they remained state residents as defined in AS 43.23.095, and their absences therefore were allowable. They point out that: N and U have owned a home in Alaska since 2008; they maintained Alaska driver's licenses, Alaska voter registration, and Alaska vehicle registrations at all relevant times; N requested Alaska as his assignment preference with the military; he claimed Alaska as his home on his military Leave and Earnings Statement; U incurred significant expense to transfer her nursing license to Alaska; and, the family ultimately moved back to Alaska.³⁶

The Division disputes the Ms' contention that they remained state residents under the fact-based inquiries of AS 43.23.008(e) and AS 43.23.095. Among other considerations, it asserts that the Ms owned a principal home in Georgia, and U M was professionally licensed as a registered nurse in Georgia.³⁷

It is not necessary to resolve this issue. Even if a fact-based inquiry would otherwise support a finding that the Ms intended to return to Alaska and to remain indefinitely, they were not eligible state residents as a matter of law.³⁸ Their extended absences between 2010 and 2014 necessarily rendered them ineligible for any PFDs after 2014, unless they re-established residency through their physical presence in Alaska.

³⁴ See *Harrod v. State, Dep't of Revenue*, 255 P.3d 991,1000 (Alaska 2011) (applicants deemed to have lost status as state residents must re-establish residency during a qualifying year).

³⁵ In addition to the family's absence due to N's military obligations, U M asserted that she was absent from the state for a period of time while attending full-time school to earn her nursing degree. Exhibit 4, p. 17; N M testimony.

³⁶ N M Testimony; Exhibit 2, p. 1; Exhibit 4, pp. 3-5.

³⁷ See Exhibit 2, p. 2.

³⁸ AS 43.23.008(d).

To re-establish PFD eligibility, the Ms needed to be state residents during the entire qualifying year for the PFD at issue.³⁹ Calendar year 2015 was the qualifying year for the 2016 PFD.⁴⁰ The Ms were not eligible state residents on January 1, 2015.⁴¹ They re-established state residency when they moved back to Alaska and were physically present, on August 3, 2015.

IV. Conclusion

N, U and Y M were absent from Alaska more than 180 days in each year between 2010 and 2014, the five years preceding the 2015 PFD. During that time, they were not physically present in Alaska at least 30 cumulative days. Because of their extended absence, the bright-line rule at AS 43.23.008(d) rendered N, U and Y M ineligible for the 2015 PFD as well as any subsequent PFDs, unless they returned to Alaska and re-established residency through their physical presence. Z M lost her status as a state resident at the same time her parents did, because a child's residency is ordinarily determined by the parent's status.

To be eligible for the 2016 PFD, the Ms needed to re-establish residency prior to January 1, 2015, the start of the qualifying year. They returned to Alaska and re-established residency on August 3, 2015, which is too late to qualify for the 2016 dividend. Because they were not eligible residents throughout the 2015 qualifying year, N, U, Y, and Z M were not eligible for the 2016 PFD.

The Division's decision is affirmed.

DATED: December 14, 2016.

By: Signed
Kathryn Swiderski
Administrative Law Judge

³⁹ AS 43.23.005(a)(3).

⁴⁰ AS 43.23.095(6).

⁴¹ 15 AAC 23.143(b) (an individual may not become a resident while absent from Alaska).

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 9th day of January, 2017.

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

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