

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

In the Matter of)	
)	
N U)	OAH No. 16-1350-PFD
_____)	Agency No. 2016-032-3622

DECISION

I. Introduction

N U is an Alaska resident who is a member of the military. The Permanent Fund Dividend Division denied Mr. U’s 2016 permanent fund dividend application because Mr. U was not physically present in Alaska for at least 72 consecutive hours during 2014-15. Mr. U appealed, arguing that he should receive a waiver because he was in Korea in 2015 on a special mission. Because Mr. U did not receive imminent danger or hostile fire pay while in Korea, however, the Division’s decision is affirmed.

II. Facts

N U serves in the U.S. Army. For purposes of qualifying for a permanent fund dividend, he has been an Alaska resident since 2011. He received a dividend in 2012-15.¹

Since 2013, however, he has been stationed outside of Alaska. In 2013, he was transferred to Base A in Texas. In 2014, he was deployed on a special mission to Base B, which is near the Korean Demilitarized Zone.² When he returned from Korea to Base A, he had some leave built up, but had to take emergency leave to attend the funeral of his father-in-law. He had given thought to travel to Alaska, but, with the demands made on his time by the military and his limited funds, he made a choice to comfort his family instead.³

While Mr. U was in Korea, he received hardship duty pay.⁴ He explained that his hardship duty pay was based on his being on a special mission. Now, however, he understands that all units stationed in close proximity to the 38th parallel receive that bonus because, in his view, it is a dangerous location.⁵

In 2016, Mr. U timely applied for a 2016 dividend. His application noted that he had not been in Alaska during 2014 or 2015.⁶ The Permanent Fund Dividend Division of the Department of Revenue denied Mr. U’s application for a 2016 dividend because Mr. U had not been in Alaska

¹ Division Exhibits 1, 4.
² Division Exhibit 9 at 3.
³ U testimony.
⁴ U testimony; U Exhibit (Leave and Earning Statement).
⁵ U testimony.
⁶ Division Exhibit 1 at 1.

for at least 72 consecutive hours during the two years before the dividend year.⁷ After the denial was affirmed in an informal conference, Mr. U appealed the denial. A hearing was held on December 15, 2016. During the hearing, Mr. U emailed a copy of one of his Military Leave and Earning Statements to the Office of Administrative Hearings and to the Division, showing that he received Hardship Duty Pay while in Korea.⁸ The record was held open until December 19th for the Division to respond.

III. Discussion

In this case, the Division admits that Mr. U qualified for a dividend in all respects except for the requirement of AS 43.23.005(a)(4) that he be in Alaska for at least 72 consecutive hours at some time during the two years before the dividend year. Mr. U admits that he did not meet the 72-hour requirement.⁹ The only issue in this case, therefore, is whether Mr. U qualifies for a waiver of the 72-hour requirement.

The legislature has given the Commissioner of Revenue authority to waive the 72-hour requirement of AS 43.213.005(4) for members of the military as follows:

- (f) The commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state
 - (1) in a time of national military emergency under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual.¹⁰

The Commissioner has adopted a policy to give guidance to the Division about when it may exercise his discretion and waive the 72-hour requirement for the 2016 dividend.¹¹ The policy recognizes that the United States is in a time of national emergency. The policy authorizes a waiver of the 72-hour requirement for a member of the military who requests a waiver and who “provides a 2015 Leave and Earning Statement showing receipt of imminent danger or hostile fire pay.”¹²

⁷ Division Exhibit 6 at 1.

⁸ U Exhibit; also found as Division Exhibit 11 at 1.

⁹ In his request for appeal, and initially at the hearing, Mr. U stated a belief that the Division was misinterpreting AS 43.23.005(a)(4). He expressed an understanding that he need only return once every three years, not once every two. The statute, however, requires that an applicant must have been “physically present in the state for at least 72 consecutive hours at some time during the prior *two* years before the current dividend year.” AS 43.23.005(a)(4) (emphasis added). After review of the statute, Mr. U agreed that it required his physical presence every two years unless waived.

¹⁰ AS 43.23.005(f).

¹¹ Division Exhibit 10. The version of the policy in the record is not signed, but this decision accepts the Division’s representation that it is an official policy adopted by the Commissioner.

¹² Division Exhibit 10.

The Division agreed that Mr. U' appeal here can be treated as a request for a waiver. In addition, as required by the Commissioner's policy, Mr. U submitted a 2015 Leave and Earning Statement. The question is whether his pay status in Korea qualified as imminent danger or hostile fire pay.

To answer this question, the Division has provided copies from exhibits that are described as official military documents explaining hardship duty, imminent danger, and hostile fire pay.¹³ These documents appear to be official documents, and I accept the Division's representation that they are official documents. If Mr. U has evidence that these documents are inaccurate, he may request a remand during the proposal for action process so that he may submit additional evidence.

The documents provided by the Division show the following:

- Mr. U received hazardous duty pay in 2015, which is coded as "HDP" on his leave and earning statement.¹⁴
- Mr. U did not receive "Imminent Danger Pay" or "Hostile Fire Pay." These pay designations would be coded on a leave and earning statement as "IDP" or "HFP."¹⁵ His leave and earning statement does not contain either designation.¹⁶

Therefore, Mr. U does not meet the standards for a waiver as outlined in the Commissioner's policy.

Two additional considerations remain. First, because the Commissioner has the discretion to deny a waiver, this decision could determine that a denial of a waiver here was an abuse of discretion. This is a very high standard, and Mr. U agreed that if he could not prove that he received imminent danger or hostile fire pay, then denial of waiver was not an abuse of discretion. Because he did not meet the requirement, or show that the requirement was arbitrary or unreasonable, Mr. U has not proved that denying a waiver would be an abuse of discretion.

Second, although the Commissioner has adopted a policy regarding waiver approval, that policy is not a binding regulation. Therefore, that policy would not prevent the Commissioner, or the Commissioner's delegee, from granting a waiver to a member of the military who is absent from Alaska under military orders during a time of national emergency. The Commissioner's authority, then, is broader than the reach of this decision—this decision can find that Mr. U

¹³ Division Exhibit 11 at 3-5.

¹⁴ U Exhibit; Division Exhibit 11.

¹⁵ Division Exhibit 11 at 4.

¹⁶ U Exhibit; Division Exhibit 11.

should receive a dividend only if it also finds that he qualifies outright for a waiver under the policy (which he does not) or a denial of a waiver would be an abuse of discretion (which it is not).

During the hearing, I alerted the parties that if this decision were to affirm the denial of the waiver, a proposal for action would result in the matter being put before the Commissioner or the Commissioner's delegee. The Division agreed that it would have no objection to Mr. U using this appeal, and the proposal for action process, to request that he be granted a waiver even if he does not qualify under the Commissioner's policy. The Division commented that it is aware of, and sympathetic to, the special burdens placed on members of the military and their families, and the difficulty they face in meeting the 72-hour rule. In its view, however, these burdens apply to all or nearly all Alaska resident military members who are deployed outside the state.

IV. Conclusion

The Division's denial of N U's 2016 permanent fund dividend is affirmed.

DATED this 30th of December, 2016.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Revenue and under the authority of AS 44.64.060(e)(1), I adopt 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 26th day of January, 2017.

By: Signed
Name: Stephen C. Slotnick
Title: Administrative Law Judge

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