

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

In the Matter of)	
)	
J Y II, N Y, AND Z Y III (MINOR))	OAH No. 17-0049-PFD
_____)	Agency No. 2016-061-9636

DECISION

I. Introduction

Sergeant J Y and his family were absent from Alaska for more than 180 days during 2015. Sgt. Y did not return to Alaska for at least 72 hours during 2014 or 2015. He did not receive “imminent danger/hostile fire pay” during 2015. Under these facts, Sgt. Y does not meet the eligibility criteria for a 2016 Permanent Fund Dividend. The denial of Sgt. Y’s application for a 2016 dividend is affirmed.

The eligibility for Sgt. Y’s family for the 2016 dividend is contingent upon his being eligible. Because he is not eligible in 2016, his wife, N Y, does not qualify in 2016 because she was absent for more than 180 days in 2015 and she does not meet the criteria for an allowable absence. Because his parents are not eligible, their son, Z Y III, does not have an eligible sponsor for the 2016 dividend. Therefore, he is not eligible. The denial of N Y’s and Z Y III’s application for a 2016 dividend is also affirmed.

II. Facts

J Y II is a Sergeant in the United States Army.¹ Sgt. Y is a resident of Alaska.² Although he is currently stationed in Hawaii, his official U.S. Army Leave-and-Earnings Statement shows that his state of legal residence is Alaska.³

Sgt. Y is married to N Y. Ms. Y is a long-time resident of Alaska, having first qualified for a Permanent Fund Dividend in 1989.⁴ The Y’s son, Z Y III, is also a resident of Alaska.

The family left Alaska in 2013 when Sgt. Y was transferred to a military base in Kentucky. They moved to Hawaii in 2015 when Sgt. Y was transferred to a base in No Name City, Hawaii. During 2014, Sgt. Y served a tour of duty in combat status in Afghanistan. During this time, he received “imminent danger/hostile fire pay”—additional pay for being stationed in

¹ Division Exhibit 9 at 4.
² Division Exhibit 9 at 4, 6.
³ Division Exhibit 9 at 6.
⁴ Division Exhibit 1 at 5.

an acutely dangerous situation.⁵ He did not, however, receive the hostile-fire pay increment during 2015.

Sgt. Y did not return to Alaska in 2014 or 2015. Ms. Y and Z, however, did come back for a visit in 2016, and they stayed more than 72 hours.⁶

When the Y family applied for a dividend for 2016, the Permanent Fund Dividend Division of the Alaska Department of Revenue denied their application because they were absent from Alaska for more than 180 days during the qualifying year (2015), and they did not meet the criteria for remaining eligible for dividend while absent. At the Ys' request, the Division provided an informal conference, during which the Division obtained additional information about Sgt. Y's combat status and the family's return visits to Alaska during 2014-15. The Informal Conference Decision affirmed the denial of the Ys' dividends.

The Ys appealed the Informal Conference Decision to a formal hearing before the Office of Administrative Hearings. The Ys elected to forgo having an oral hearing at which they could present evidence of their eligibility for the dividends. Instead, they asked that this matter be decided upon the record and the statements the parties submitted to this office.

III. Discussion

1. Is Sgt. Y eligible for a 2016 dividend?

Under the law, in order to remain eligible for a dividend when absent for more than 180 days, a resident of Alaska must have an allowable reason for the absence, and must visit Alaska for at least 72 hours every two years.⁷ In this case, the Division does not dispute that Sgt. J had an allowable reason for his absence: being on active duty in the armed forces of the United States stationed outside the state.⁸ The 72-hour rule still applies to a member of the armed forces.

Here, the Division admits that Sgt. Y would qualify for a dividend 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. J admits that he did not meet the 72-hour requirement. The only issue in this case, therefore, is whether Mr. Y qualifies for a waiver of the 72-hour requirement.

⁵ Division Exhibit 9 at 6.

⁶ Division Exhibit 1 at 6; 9 at 7-8.

⁷ AS 43.23.005(a)(4). Under this statute, "[a]n individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025_if the individual . . . (4) has 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."

⁸ AS 43.23.008(3).

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.⁹

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.¹⁰ 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.”¹¹

In his request for a formal hearing, Sgt. Y pointed out that “I was deployed for 75% of [] 2014 to Afghanistan and [was] receiving [and] was eligible for hostile fire or imminent danger pay.”¹² He argues that he was not aware that the policy required that his receipt of the imminent danger/hostile fire pay increment had to occur in 2015 in order to qualify him for the waiver.¹³ He notes that “[b]y the time provisions made by the Office of the Commissioner was issued it was too late to meet this new provision.”¹⁴ He asks that the Commissioner waive the 72-hour rule for him.

Sgt. Y is correct that the Commissioner signed the 2016 dividend policy on January 4, 2016.¹⁵ By the time that the Commissioner signed the policy, it was already too late for Sgt. Y to come to Alaska during the qualifying year, 2015.

In some circumstances, the government is not allowed to deny a benefit if different from a position it has previously taken. This doctrine is called estoppel and it applies when

1. The government asserts a position (by word or conduct);
2. A member of the public takes action after reasonably relying on the government’s position;

⁹ AS 43.23.005(f).
¹⁰ Division Exhibit 11 at 1.
¹¹ Division Exhibit 11 at 1.
¹² J Exhibit.
¹³ Division Exhibit 9 at 4.
¹⁴ *Id.* at
¹⁵ Division Exhibit 11 at 1.

3. The person suffers prejudice as a result; and
4. Estoppel serves the interest of justice.¹⁶

Here, Sgt. Y has not explained what statement or action by the Department led him to believe that his hostile-fire service in 2014 was sufficient to waive the 72-hour requirement for 2016. If he was relying on the policy for the previous year (which he does not assert), he has not provided a copy of that policy or any reason why he would think that the Department has previously allowed waivers when the hostile-fire service did not occur during the qualifying year.

To be sure, Sgt. Y's position is not illogical—the 72-hour-rule is spread over two years, so an applicant might wonder whether the waiver also goes back for two years. But the Commissioner's policy is more closely aligned with the legislative scheme in that it is based on the *qualifying* year—a member of the military's inability to return to the state during the qualifying year is the determinative factor in whether the member is entitled to a waiver.

The cases on the 72-hour rule have held that it is strictly enforced.¹⁷ Moreover, other members of the military have been denied dividends under this rule, even though they had good reasons for being unable to return for 72 hours during the preceding two years.¹⁸ In these circumstances, Sgt. Y has not come forward with a compelling case that he is entitled to a waiver of the 72-hour rule.¹⁹ Therefore, the determination that he was not entitled to a waiver of the 72-hour rule for the 2016 dividend is affirmed. Without a waiver, he is not eligible for the 2016 dividend.

2. Is Ms. Y eligible for a 2016 dividend?

Although Ms. Y appears to have met the 72-hour rule, to be eligible for the 2016 dividend, she still must prove that her absence from Alaska for more than 180 days in 2015 was due to an allowable absence. Ms. Y's claim for an allowable absence as based on her status as a spouse of a member of the military on active-duty. That claim, however, works only when the *spouse* is eligible.²⁰ Here, Ms. Y's spouse, Sgt. Y, is not eligible for the 2016 dividend. Therefore, Ms. Y herself is also not eligible.

¹⁶ *In re SD*, OAH No. 11-0294-PFD at 2 (Dep't of Rev. 2011) (citing *Hidden Heights Assisted Living, Inc. v. State*, 222 P.23d 258, 268 (Alaska 2009); *In re G.C.*, OAH No. 09-0436-PFD at 2 (Dep't of Rev. 2010).

¹⁷ *In re SD*, OAH No. 11-0294-PFD at 2.

¹⁸ *Id.*; *In re J.G.G.*, OAH No. 09-0266-PFD (Dep't of Rev. 2009).

¹⁹ The Commissioner's policy regarding waiver approval is not a binding regulation, and this decision is not based solely on a blanket application of the policy. Instead, Sgt. J's request for an appeal is treated as a request for a waiver based on his facts and circumstances. As explained in this decision, his facts and circumstances do not qualify him for a waiver.

²⁰ AS 43.23.008(a)(3)(B) (allowable absence includes accompanying spouse in active duty military service if spouse is "eligible for current year dividend").

3. Is Z eligible for a 2016 dividend?

For a minor to be eligible for a dividend, the minor must have an eligible sponsor.²¹ When a minor does not have an eligible sponsor, the minor’s dividend application will be denied even if the minor otherwise meets the criteria for eligibility. Here, because neither Sgt. Y nor Ms. Y are eligible for a 2016 dividend, Z did not have an eligible sponsor. Therefore, he is not eligible for a 2016 dividend.

IV. Conclusion

The Division’s decision denying the 2016 dividend for J Y II, N Y, and Z Y III is affirmed.

DATED this 14th of June, 2017.

By: Signed _____
Bride A. Seifert
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 11th day of July, 2017.

By: Signed _____
Signature
Bride A. Seifert _____
Name
Administrative Law Judge _____
Title

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

²¹ 15 AAC 23.113(b).