

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

In the Matter of)
)
S N,)
C N, SR. and)
C N, JR.)
) OAH No. 17-0831-PFD
2016 and 2017 Permanent Fund Dividends) Agency No. 2016-020-3473

DECISION & ORDER

I. Introduction

S N appeals the Permanent Fund Dividend Division’s decisions retrospectively denying 2016 Permanent Fund Dividends (PFDs) for herself and her minor son, C N Jr., and assessing an obligation to repay the PFD amounts plus interest. Ms. N and her husband, C N Sr., also appeal the Division’s decisions denying their 2017 PFD applications. Ms. N’s 2017 applications for the couple’s two children, C Jr. and D, are not officially under review, because Ms. N did not informally appeal after the Division denied their applications. However, the Division has indicated that it would overturn the children’s denials if Ms. N’s 2017 PFD application is approved.¹

This decision concludes that Ms. N was not eligible for the 2016 PFD. Her act of registering to vote in Colorado in 2015 categorically disqualified her for the 2016 PFD. More significantly, after the military relocated her to Colorado in 2015, Ms. N rapidly developed closer ties to Colorado than to Alaska. Thus, the Division appropriately concluded that she severed her Alaska residency for PFD purposes in 2015. As a result, she is not eligible for the 2016 or any subsequent PFDs unless she returns to Alaska and re-establishes residency. Because the Division already paid 2016 PFDs for Ms. N and C Jr., who lacked an eligible sponsor, it may seek assessment for purposes of repayment.

The Division also correctly denied Mr. N’s 2017 PFD application because he was absent from Alaska while accompanying an ineligible servicemember spouse. His 357 days of absence during 2016 therefore disqualify him from 2017 eligibility.

The 2016 dividends were paid erroneously. The error was entirely attributable to Ms. N—she received payment because she provided misinformation to the Division—and there is no basis to excuse her from the obligation to repay.

¹ See Division Position Statement, p. 2, fn. 1.

II. Facts and Proceedings

A. State Ties

S N is an active duty member of the U.S. Air Force.² While she was stationed in Alaska, Ms. N, C Senior, and two-year-old C Junior applied for and received their first PFD payments in 2014.³ They also received the 2015 PFD. Ms. N never registered to vote in Alaska or acquired an Alaska driver's license. She retained her Florida license and voting registration.⁴ While the couple were in Alaska, her husband obtained an Alaska driver's license and voter registration, though it appears he never voted in the state.⁵

In 2015, the Air Force transferred Ms. N to Colorado.⁶ The family left Alaska on June 1, 2015.⁷ On September 4, 2015, Ms. N obtained a Colorado driver's license and registered to vote in Colorado.⁸ At some point, she and Mr. N registered their vehicles in Colorado.⁹ Mr. N also obtained a Colorado driver's license and found full-time employment in Colorado, but he did not change his voter registration.¹⁰ The couple currently own a principal home in Colorado.¹¹

In September 2016, baby D joined the N family.¹² In November 2016, all four members of the family traveled to Alaska for an eight-day visit.¹³

Ms. N's Leave and Earnings Statements still identify Alaska as her state of legal residence.¹⁴ She and Mr. N designated themselves as full-year nonresidents of Colorado on their 2015 and 2016 Colorado tax returns.¹⁵ They also claimed Alaska residency for purposes of their Colorado vehicle registrations. They do not have family ties to Alaska, but they have friends who continue to live in the state.¹⁶

² See Exhibit 3, p. 2.

³ Exhibit 22.

⁴ Exhibit 14, p. 2; Exhibit 17, p. 13.

⁵ See Exhibit 18, p. 7, Fact 8.

⁶ Exhibit 14, p. 6.

⁷ Exhibit 10.

⁸ Exhibit 14, p. 2; Exhibit 16, p. 1.

⁹ Exhibit 10, p. 3.

¹⁰ Exhibit 16, p. 3.

¹¹ Exhibit 16, p. 3. They do not appear to have any property interests remaining in Alaska.

¹² See Exhibit 19, p. 1 (date of birth 9/00/16).

¹³ See Exhibit 19, pp. 12-17; Exhibit 18, p. 1.

¹⁴ Exhibit 19, p. 6.

¹⁵ Exhibit 19, pp. 4-5.

¹⁶ Exhibit 21, p. 14.

B. 2016 Applications

In January 2016, while stationed in Colorado, Ms. N submitted 2016 PFD applications for herself and C Jr.¹⁷ C Senior did not apply.¹⁸ On her application, Ms. N checked a box indicating that she did not intend to return to Alaska to remain indefinitely and make her principal home in the state.¹⁹ For this reason, the Division determined that Ms. N was not eligible, and it denied her application.²⁰ It denied C Junior's application for lack of an eligible sponsor.²¹

Ms. N submitted informal appeals contesting both decisions.²² She argued that her response had been an accident, and she in fact planned on remaining an Alaska resident indefinitely.²³ She also indicated that she had not claimed residency in Colorado or taken other action inconsistent with her Alaska residency. Notably, she had certified on her original application that she had not registered to vote in a state other than Alaska.²⁴ Based on these assurances, the Division overturned its decisions in August 2016.²⁵ It approved and paid 2016 PFDs for both Ms. N and for C Junior.²⁶

C. 2017 Applications

In January 2017, Ms. N and Mr. N submitted applications for the 2017 PFD.²⁷ Ms. N also submitted applications as sponsor for C Jr. and D.²⁸ On her 2017 Adult Supplemental Schedule, Ms. N stated that she had registered to vote in Colorado in July 2016.²⁹

Concluding that Ms. N's voter registration outside Alaska independently disqualified her for the 2017 PFD, the Division denied her application.³⁰ It simultaneously denied C Jr.'s and D's 2017 applications for lack of an eligible sponsor.³¹ It denied C Sr.'s application on multiple bases: he was unallowably absent from Alaska more than 180 days during the 2016 qualifying year while accompanying an ineligible military spouse; without an allowable military absence,

¹⁷ Exhibit 1 (S); Exhibit 21 (C Junior).

¹⁸ Exhibit 22, p. 3. He later explained this, stating he missed the application deadline. Exhibit 16, p. 4.

¹⁹ Exhibit 1, p. 3; Exhibit 2, p. 1.

²⁰ Exhibit 2.

²¹ Exhibit 21.

²² Exhibit 3 (S appeal); Exhibit 21, p. 7 (C Jr. appeal).

²³ Exhibit 3.

²⁴ Exhibit 1, p. 3.

²⁵ Exhibits 5, 6; Exhibit 21, p. 9.

²⁶ Exhibits 5, 6; Division Position Statement, p. 2. The 2016 PFD totaled \$1,022.

²⁷ Exhibit 10.

²⁸ Exhibit 19, p. 1.

²⁹ Exhibit 10, p. 3.

³⁰ Exhibit 13, pp. 1-2.

his principal home and full-time job in Colorado were independently disqualifying; and, he had severed his Alaska residency before January 1st of the qualifying year.³²

Ms. N and Mr. N both requested informal appeals of their 2017 applications.³³ During the informal appeal process, Ms. N submitted her Colorado voter registration information, which showed that she actually registered to vote in Colorado on September 4, 2015, not in July 2016 as she incorrectly indicated on her 2017 application.³⁴

D. Division's Review of 2016 PFD Determinations

After learning of Ms. N's 2015 Colorado voter registration, the Division reviewed her 2016 PFD application and 2016 informal appeal. It noted that she had not disclosed her out-of-state voter registration which occurred during the qualifying year for that dividend, despite being specifically asked about the subject.³⁵ After re-evaluating her situation, including her ties to Alaska and to Colorado, the Division concluded that Ms. N had severed her Alaska residency for PFD purposes when she registered in Colorado.³⁶ It also determined that registering to vote in Colorado independently disqualified her from eligibility for the 2016 PFD.³⁷ On June 23, 2017, the Division denied both Ms. N's and C Jr.'s 2016 PFD applications.³⁸ It assessed Ms. N with the obligation to refund the payments.³⁹

Ms. N submitted a second informal appeal for both applications.⁴⁰ She asserted that her active duty military assignment in Colorado qualified as an allowable absence from Alaska. She argued that she claimed Alaska residency for purposes of her taxes and vehicle registrations, and the family had visited Alaska in November 2016 in order to retain state residency. She explained that she registered to vote in Colorado "because I was no longer a Florida resident."⁴¹ In addition, she had not understood that registering to vote in Colorado and obtaining a Colorado driver's license would impact her status as an Alaska resident, particularly since she had qualified as an Alaska resident while living in Alaska, despite possessing a Florida driver's

³¹ See Exhibit 11, p. 1.

³² Exhibit 13, pp. 3-8.

³³ Exhibit 14.

³⁴ Exhibit 16, p. 1.

³⁵ Exhibit 7.

³⁶ Exhibit 18, p. 2; Exhibit 7.

³⁷ *Id.*

³⁸ Exhibit 7; Exhibit 21, p. 10. C Junior's application was denied for lack of an eligible sponsor.

³⁹ Exhibit 7; Exhibit 21, p. 10.

⁴⁰ Exhibit 8 (S); Exhibit 21, pp. 13-14 (C Jr.).

⁴¹ Exhibit 8, p. 2.

license and being registered to vote in Florida. She sought to remedy the situation by requesting to withdraw her Colorado voting registration.

The Division issued informal appeal decisions upholding both denials.⁴² It again determined that Ms. N's 2015 Colorado voter registration independently disqualified her from the 2016 PFD, and further concluded that she had severed her Alaska residency when she registered to vote, and she was not a "state resident" for PFD purposes throughout the 2015 qualifying year and at the time she applied for the 2016 PFD. As a result of his mother's status, C Jr. did not have an eligible sponsor. The Division also concluded that C Jr. was absent from Alaska more than 180 days while accompanying an ineligible individual, and he was not a state resident for PFD purposes throughout the 2015 qualifying year.⁴³

E. 2017 PFD Informal Appeal Decisions

On June 23, 2017, the Division issued informal appeal decisions denying Ms. N's and Mr. N's 2017 PFD applications.⁴⁴ The Division repeated its conclusions that Ms. N had severed her Alaska residency for PFD purposes prior to 2016; she had not reestablished it before January 1st of the qualifying year; she had more ties indicative of Colorado than Alaska residency; and she was not an eligible Alaska resident for PFD purposes.⁴⁵

The Division denied Mr. N's application for essentially the same reasons.⁴⁶ It concluded he held more ties indicative of Colorado than Alaska residency, and he was not a "state resident" for PFD purposes throughout the 2016 qualifying year. Since Ms. N was not an eligible state resident who was allowably absent from the state, Mr. N also was not allowably absent while accompanying her on her military assignment. Therefore, his principal residence and full-time employment in Colorado were independently disqualifying.

Mr. and Ms. N requested a formal hearing by written correspondence. Pursuant to the hearing schedule, the Division filed a position statement and supporting exhibits, arguing that each of its decisions should be upheld. The N's relied on the existing agency record and did not submit additional briefing or exhibits.

⁴² Exhibit 9; Exhibit 21, pp. 16-22.

⁴³ Exhibit 21, p. 16.

⁴⁴ Exhibit 18. It presumably denied the two children's applications at the same time.

⁴⁵ Exhibit 18, pp. 1-5.

⁴⁶ Exhibit 18, pp. 6-8.

III. Discussion

The N's formal appeal request broadly challenges the Division's denial of Ms. N's and C Jr.'s 2016 applications, and the denial of all four family members' 2017 applications.⁴⁷ Because Ms. N did not informally appeal either of her sons' 2017 applications, however, those applications are not properly presented in this formal appeal.⁴⁸

As the parties requesting a hearing, the N's bear the burden of proving that the Division erred in denying their respective applications.⁴⁹

A. *S N's Eligibility for the 2016 and 2017 PFDs*

Pursuant to AS 43.23.015, the Commissioner of Revenue has adopted regulations to determine the eligibility of individuals for permanent fund dividends. The Department of Revenue is bound by its own regulations.⁵⁰ One of those regulations, 15 AAC 23.143(d), describes seventeen circumstances that automatically disqualify an individual from a PFD when they take place during the qualifying year. The disqualifying circumstance in this case is the twelfth one, relating to out-of-state voter registration. The regulation provides in relevant part:

An individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual has

(12) registered to vote in another state or country, except if the individual

(A) registered to vote in another state within 30 days of a presidential election solely for the purpose of voting in that election and voted in no other election in another state than that for president of the United States; or

(B) registered to vote in another country for which the individual was not required to claim residency of the country in order to register to vote[.]⁵¹

The qualifying year for the 2016 dividend was 2015.⁵² During that year, Ms. N registered to vote in another state. This places her squarely within the ambit of 15 AAC 23.143(12). She does not satisfy either of the two exceptions to the bright-line rule. Therefore, even if she had

⁴⁷ Exhibit 19, p. 1. The dividends at issue are the 2016 and 2017 PFDs, not 2015 and 2016 as Ms. N incorrectly indicated on the appeal form.

⁴⁸ See Division position statement, p. 2, fn. 1.

⁴⁹ 15 AAC 05.030(h).

⁵⁰ See, e.g., *Brandon v. State, Dep't of Corrections*, 73 P.3d 1230, 1235 (Alaska 2003).

⁵¹ 15 AAC 23.143(d).

remained a “state resident” throughout 2015, she is automatically disqualified from eligibility for the 2016 PFD. This is a purely objective test, and the regulation provides no discretion to reach another result.

The Division argues that the facts of this case justify a broader conclusion: that Ms. N severed her Alaska residency for PFD purposes when she registered to vote in Colorado. As a result, it asserts that she was not a “state resident” throughout 2015 and on the date she submitted her 2016 PFD application, and she is ineligible for the 2016 and any subsequent dividends unless she returns to Alaska and re-establishes residency.

To qualify for the 2016 PFD, the applicant must have been a “state resident” throughout the 2015 qualifying year, as well as on the date of application.⁵³ A person first becomes a “state resident” “by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.”⁵⁴ Once residency is established, a person remains a state resident during an absence from the state “unless during the absence the person establishes or claims residency in another state . . . or performs other acts or is absent under circumstances that are inconsistent” with the intent to return to the state and remain indefinitely to make a home in Alaska.⁵⁵

In assessing whether Ms. N remained a “state resident” throughout 2015 and at the time of her 2016 PFD application, the law requires a broad assessment of her circumstances. Unlike the bright-line test for one-time disqualifying events, residency is judged on the basis of many factors, including whether an individual has:

- (1) taken steps to establish Alaska residency and sever residency in a previous state or country;
- (2) ties to another state or country that indicate continued residency in the other state or country; and
- (3) taken other action during or subsequent to the qualifying year that is inconsistent with an intent to remain in Alaska indefinitely.⁵⁶

Applying these guidelines, Ms. N more likely than not severed her Alaska residency after she moved to Colorado in 2015, registered to vote, and developed stronger ties to Colorado than Alaska. This is demonstrated by her Colorado driver’s license, vehicle registration and voter

⁵² AS 43.23.095(6).

⁵³ AS 43.23.005(a)(2), (a)(3).

⁵⁴ AS 01.10.055; 43.23.095(7).

⁵⁵ AS 01.10.055(c); *see also* 43.23.095(7).

⁵⁶ 15 AAC 23.143(a).

registration – when she acquired none of these ties to Alaska while living in the state – and by her home ownership and principal residence in Colorado. The most significant of these ties is the voter registration, because it necessarily required Ms. N to claim legal residence in Colorado. The registration form includes the applicant’s affirmation that the listed Colorado address “is **my sole legal place of residence**” and “I claim no other place as my legal residence.”⁵⁷ This declaration is inconsistent with continuing Alaska state residency. Were it an isolated act done by mistake, it might not truly sever Alaska residency, but when viewed as a whole with the other facts and circumstances of this case, it tips the balance to Colorado rather than Alaska residency.

Ms. N’s friendships with residents of Alaska, her 2016 visit, employment records, and tax declarations are not sufficient to overcome her claim of residency in Colorado and her stronger ties to that state. Therefore, the Division appropriately found that she ceased to be a “state resident” of Alaska after registering to vote in Colorado in September 2015. She has not returned to Alaska for a period long enough to re-establish a severed residency, so she is not eligible for either the 2016 or the 2017 PFD.

B. C Jr.’s 2016 PFD Eligibility

To be eligible for a dividend, a child must have a sponsor who is eligible for a dividend in his or her own right.⁵⁸ For the reasons stated above, C Jr. did not have an eligible sponsor for his 2016 application. The Division therefore correctly denied his application.

C. Assessment of 2016 PFDs for Repayment

While Ms. N and her son were clearly ineligible for the 2016 dividends, these dividends have already been paid. An additional decision is required as to whether the Department should force their repayment.

Alaska law authorizes the Department to recover incorrectly-issued dividend payments if they were not issued due to Division error.⁵⁹ Assessment of a PFD that has already been paid, but paid in error, is a matter of discretion. Alaska Statute 43.23.035(b) provides that if the commissioner determines that a dividend should not have been paid, he “may” recover the payment. Likewise, 15 AAC 23.233(a) permits the Department “in its discretion” to elect to take steps to recover a dividend paid to an individual who was not eligible. While in many cases it

⁵⁷ Exhibit 23 (emphasis in original).

⁵⁸ 15 AAC 23.113(b).

⁵⁹ AS 43.23.035(b); AS 43.23.245; 15 AAC 23.233.

will be good policy to recover dividends that have been paid in error, the Department is never compelled by law to do so.

In past cases involving whether to assess a paid dividend for repayment, the Department of Revenue has considered surrounding circumstances including:

- (1) the passage of time since the dividend was paid;
- (2) whether there is room for argument that the applicant's action was not legally disqualifying;
- (3) whether the applicant erroneously reported the disqualifying information on the PFD application;
- (4) whether the applicant should have known at the time of application that he or she was ineligible; and
- (5) whether the applicant received a financial benefit from the allegedly disqualifying act.⁶⁰

In this case, the first four factors strongly point toward recovery. It has been only a year since these dividends were paid, and Ms. N has been on notice of a potential problem for much of that time. The registration to vote in another state was unarguably disqualifying, it was something the applicant directly misstated in the application, and it was a circumstance that she probably knew to be disqualifying in light of her decision to misreport it. As to the fifth factor, there was no financial benefit from the disqualifying item (so far as we know, Ms. N received no in-state benefits from Colorado as a result of her voter registration). However, the first four factors outweigh this circumstance. On balance, it is fair and appropriate, and in keeping with upholding the integrity of the program, for the Department to reclaim the dividends paid to Ms. N and her dependent in 2016.

D. C N Sr.'s 2017 Eligibility

It is not necessary to determine whether Mr. N continued to be a "state resident" throughout the 2016 qualifying year and at the time he submitted his 2017 PFD application – a question that would be difficult to fully assess on the existing record. Unlike his wife, Mr. N

⁶⁰ See *In re M.E.*, OAH No. 13-1625-PFD (Dep't of Revenue 2014) (all factors but number 5 point to recovery; assessment upheld); *In re D.R.W.*, OAH No. 08-0253-PFD (Dept. of Revenue 2008) (all factors favored applicant; assessment overturned); *In re E.L.K.*, OAH No. 06-0785-PFD (Dept. of Revenue 2007) (factors 2, 3, and 4 weighed against applicant; assessment upheld); *In re R.E.*, OAH No. 06-0385-PFD (Dept. of Revenue 2006) (where factors 1 and 3 favored the applicant but 2, 4, and 5 weighed against, case close but assessment upheld in deference to PFD Division's judgment to assess; for other dividends where there was uncertainty under 2 and 4 and no benefit under 5, assessment overturned).

registered to vote in Alaska when he lived in the state. He did not register to vote in Colorado or take other action that is clearly inconsistent with a claim of Alaska residency, or that necessarily tips the balance toward a finding of Colorado residency.

Nonetheless, Mr. N was absent from Alaska for 357 days of the 2016 qualifying year, and he is not eligible for the 2017 PFD. He claimed eligibility under AS 43.23.008(a)(3), which provides an allowable absence for spouses of active duty military members who accompany the servicemember on assignment out of state. However, that provision is available only when the servicemember is also eligible for the dividend at issue. Because Ms. N is not eligible for the 2017 PFD, Mr. N was not “allowably absent” while accompanying her on her military assignment. He, too, is not eligible for the 2017 PFD.⁶¹

IV. Conclusion

Ms. N’s act of registering to vote in Colorado in 2015 independently disqualified her from eligibility for the 2016 PFD. Moreover, in conjunction with the other evidence of Ms. N’s conduct since relocating to Colorado, her voter registration and associated claim of legal residence in Colorado reflects Ms. N’s closer ties to Colorado than to Alaska. At the time she registered to vote in Colorado, Ms. N severed her Alaska residency for PFD purposes. As a result, she is not eligible for the 2016 or any subsequent PFDs unless she returns to Alaska and re-establishes residency. Because the Division already paid 2016 PFDs for Ms. N and C Jr., who lacked an eligible sponsor, it may seek assessment for purposes of repayment.

The Division also correctly denied Mr. N’s 2017 PFD application. Without deciding whether he severed his Alaska residency, he was absent from Alaska 357 days in 2016 while accompanying an ineligible servicemember spouse. He does not satisfy any other allowable absence provisions.

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⁶¹ See AS 43.23.008(a)(3), (17). Because he was not allowably absent, his principal residence in Colorado and full-time job are also disqualifying.

V. Order

IT IS HEREBY ORDERED:

- The Permanent Fund Dividend Division’s decisions denying and assessing the applications of S N and C N Jr. for the 2016 Permanent Fund Dividend are **AFFIRMED**;
- The Division’s decision denying the applications of S N and C N Sr. for the 2017 Permanent Fund Dividend are **AFFIRMED**.

DATED: October 12, 2017.

By: Signed
Christopher Kennedy
Deputy Chief 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 7th day of November, 2017.

By: Signed
Signature
Christopher Kennedy
Name
Commissioner’s Delegate
Title

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