

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

| | | |
|-------------------------------------|---|--------------------------|
| In the Matter of |) | |
| |) | |
| K H, JR. |) | |
| |) | OAH No. 20-0934-PFD |
| <u>2020 Permanent Fund Dividend</u> |) | Agency No. 2020-016-7132 |

DECISION

I. Introduction

K H, Jr. timely filed an application for a 2020 Permanent Fund Dividend (PFD), disclosing that he was absent from Alaska a total of 307 days during the qualifying year. He is a merchant mariner and spent most of his time in 2019 outside Alaska, employed at sea.

The PFD Division (Division) denied Mr. H’s application initially and at the formal appeal level on the basis that he was absent from Alaska for more time than allowed while not engaged in one of the special activities for which the PFD statute allows longer absences. Because his absence qualifies as an allowable absence per AS 43.23.008(a)(4), the Division’s decision is reversed.

II. Facts

The facts of this case are essentially undisputed, with only their legal consequences at issue. Mr. H is a resident of Alaska and filed for and received PFDs in 2008-10, 2012-15, 2017, and 2018.¹ He did not file for a PFD in 2011. His 2016 application was deemed ineligible because he was absent from Alaska more than 45 days in addition to certain other allowed absences.² His 2019 application was deemed ineligible because he was absent from Alaska greater than 180 days while serving aboard a United States naval vessel.³

On his 2020 PFD web application, Mr. H indicated that he was absent from Alaska a total of 307 days during the 2019 qualifying year.⁴ At the Division’s request, he provided completed questionnaires together and additional supporting documentation.⁵ He explained that he is a merchant mariner who resides in Alaska, owns a home in Alaska and returns to Alaska when he is not working. However, his job requires that he work out-of-state, only returning to see his wife twice per year.⁶ Although the extended absence questionnaires create a discrepancy

¹ Ex. 15.
² Ex. 15; Division Position Statement, dated December 16, 2020, at p. 1; AS 43.23.008(a)(17)(C).
³ Ex. 15; Division Position Statement at p. 1; AS 43.23.008(a)(17)(A).
⁴ Ex. 1, pp. 1, 3. From February 27, 2019 until after December 31, 2019.
⁵ Exs. 3-7.
⁶ Ex. 4, p. 2.

regarding exactly how many days Mr. H spent outside of Alaska during the 2019 qualifying year,⁷ the Sea Service Letter from the Department of the Navy clarifies this point. It confirms that Mr. H was absent from Alaska a total of 313 days during the 2019 qualifying year, with virtually all of that spent on the USNS Vessel A.⁸

Mr. H's 2020 application was denied on the basis that he was unallowably absent from Alaska for more than 180 days in 2019 while employed aboard a vessel that was not part of the U.S. Merchant Marine fleet.⁹ He filed an informal appeal of the denial¹⁰ indicating that he is a merchant mariner who is working on a vessel, the USNS Vessel A, which is a vessel of the merchant marine built by the Navy. He indicated that it is not actually a military ship, but instead, a merchant marine vessel that works for the Navy.¹¹ Records indicate that the USNS Vessel A is a U.S. Navy, Military Sealift Command, Naval Fleet Auxiliary Force.¹²

Mr. H's informal appeal was denied on the basis that he failed to prove that he was serving on a vessel of the United States Merchant Marine.¹³ He filed a request for formal hearing by written correspondence.¹⁴ He asserts that, he works as a merchant mariner, the USNS Vessel A is a vessel of the Merchant Marine, and that he was previously deemed eligible for earlier PFD applications under similar circumstances.¹⁵

Based on submission of all documentation in this case, it is now ripe and ready for ruling.

III. Discussion

The qualifying year for the 2020 dividend was 2019.¹⁶ AS 43.23.008 addresses under what circumstances, and for how long, an applicant may be absent from Alaska during the qualifying year and remain eligible for a PFD. Generally, an applicant cannot be absent from Alaska for more than 180 days unless he meets one of allowable absence categories listed in

⁷ This is because despite noting on his application that he was absent from Alaska from February 27, 2019 until after the end of the year, Ex. 1, at 3, in both extended absence questionnaires Mr. H indicates he returned to Alaska on January 8, 2019 and did not leave again until February 2, 2020. Ex. 4, p. 1 and Ex. 5, p. 1. Therefore, per his application, he was outside of Alaska at least 307 days in 2019, whereas per his questionnaires, he was in Alaska nearly all of 2019. Mr. H's Alaska Airline boarding passes also support the fact that he was outside of Alaska for most of 2019. Ex. 4, pp. 3-4; Ex. 5, pp. 3-4.

⁸ Ex. 7.

⁹ Ex. 17.

¹⁰ Ex. 9.

¹¹ Ex. 10 at p. 1.

¹² Ex. 18 at p. 1.

¹³ Ex. 11.

¹⁴ Ex. 12.

¹⁵ Ex. 12 at p. 2.

¹⁶ AS 43.23.295(6).

the statute. The single allowable absence provision at issue here is the following:

Subject to [certain conditions not at issue here], an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent

* * *

(4) *... serving under foreign or coastal articles of employment aboard an oceangoing vessel of the United States merchant marine . . .*¹⁷

Therefore, to qualify for an absence under this provision, an applicant must be both employed *and* aboard an oceangoing vessel of the United States merchant marine.

The intent of the above-referenced enactment was to enable Alaskans who were spending significant time outside of Alaska while employed as merchant mariners, from being deemed ineligible for a PFD. It also sought to encourage Alaskans to seek employment within the U.S. merchant marine industry.¹⁸

Here, the Division does not contest that Mr. H is a merchant mariner and that he was employed as such for the entirety of his time outside Alaska during the qualifying year.¹⁹ The issue in this case is whether the ship on which Mr. H served, the USNS Vessel A, is properly construed as a vessel of the United States merchant marine?

The Division argues that it construes the definition of ‘U.S. Merchant Marine fleet’ as a “a fleet of vessels engaged in commerce.”²⁰ According to the Division, “‘Commerce’ is what distinguishes Mr. H’s service as not within both the legislative intent of the statute, or, the scope of the accepted meaning of the phrase ‘U.S. Merchant Marine’ fleet.”²¹ The Division’s view is that because there is nothing to suggest that the USNS Vessel A is anything other than a Naval Fleet Auxiliary Force vessel, it does not construe the ship as being a ship of the United States Merchant Marine engaged in commerce.²² However, such a construction is not only contrary to the Division’s previous position on analogous facts, but further, is far too narrow.

Instead, “[t]he statutory framework for regulating shipping does not treat the industry as a mere form of commerce.”²³ The intent of Congress was to create a shipping mechanism to carry the greater portion of commerce of the United States *and* to assist in national defense in time of

¹⁷ AS 43.23.008(a)(4) (emphasis added).

¹⁸ Exs. 19-20.

¹⁹ *See generally*, Division Position Statement; Ex. 18.

²⁰ Division Position Statement at p. 4.

²¹ *Id.*

²² Division Position Statement at p. 5.

²³ *Conoco, Inc. v. Skinner*, 781 F. Supp. 298, 302 (D. Del. 1991).

war and national emergency. One of the three statutes enacted in furtherance of that policy was the Merchant Marine Act of 1920.²⁴ As the Act provides, its intent and purpose was to develop a fleet of U.S. owned vessels for the national defense of the United States and sufficient to carry on the waterborne commerce of the United States, both domestic and foreign.²⁵ Nothing within the Act nor any of its characterizations suggest that it does not include federally owned ships, or ships that are part of the Naval Fleet Auxiliary Force or the Military Sealift Command. In fact, the opposite is true.²⁶

Such a construction is also consistent with previous Commissioner of Revenue cases and previous positions taken by the Division on the issue. *In re J.C.*, involved a PFD applicant and Alaska resident who worked outside of the state as a merchant mariner for part of the year. He did so on a ship which was part of the U.S. Navy's Military Sealift Command ("MSC"). The MSC ships are crewed by civilian merchant mariners who provide logistical support throughout the world to the to the Unites States Naval fleet.²⁷

During the qualifying year, the applicant was absent from Alaska 204 days, 136 of which were spent while serving as a merchant mariner on ships within the MSC. However, in addition to those days, the applicant also spent 19 days outside of Alaska on leave and 39 days waiting to be assigned to other ships. As noted in the case, "[f]or the 136 days that Mr. C was aboard a vessel, *the division has agreed that Mr. C's service is allowable under AS 43.23.008(4).*"²⁸ In other words, and importantly here, the Division in that case specifically concluded that an applicant's time spent aboard a MSC ship as a merchant mariner was allowable per AS 43.23.008(4). Ultimately, the applicant was deemed ineligible however, because of the time he spent outside of Alaska while not employed aboard MSC ships as a merchant mariner.²⁹

Another case, *In re HLX*, involved a merchant mariner who was absent from Alaska for 251 days in serving as a merchant mariner aboard a private, American-flagged vessel.³⁰ As the administrative law judge indicated in that case:

²⁴ *Conoco, Inc. v. Skinner* at 302; 46 U.S.C. § 50101.

²⁵ 46 U.S.C. § 50101.

²⁶ For a general discussion of the U.S. merchant marine, *see* http://en.wikipedia.org/wiki/United_States_Merchant_Marine (The United States Merchant Marine refers to either United States civilian mariners, or to U.S. civilian and federally owned merchant vessels).

²⁷ *See generally, In re J.C.*, OAH No. 09-0307-PFD, (Dep't of Rev., Sept. 2009) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5399>).

²⁸ *In re J.C.* at 3 (emphasis added).

²⁹ *In re J.C.* at 4.

³⁰ *See generally, In re HLX*, OAH Case No. 07-0667-PFD (Dep't of Rev., Dec. 2007) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5206>).

[i]n denying Mr. X's PFD, the division was under the impression that U.S. merchant marine vessels are government vessels and that [the vessels of Mr. X's private employer] are not part of the U.S. merchant marine. This is mistaken. While there are a few government-owned merchant marine vessels, the merchant marine of this country is made up primarily of private vessels, their distinguishing characteristics being that they are under U.S. registry and therefore fly the American flag.³¹

The Merchant Marine Act made these vessels subject to requisition during national emergencies.³²

Also cited by the Division is *In re KJ*.³³ Similar to here, in that case, the applicant was an Alaska resident who served as a merchant seaman aboard a supply vessel providing services in U.S. territorial waters in the Gulf of Mexico. During the qualifying year, he spent 191 days outside of Alaska, all of which was part of his employment. In that case, however, it was held that because the vessel the applicant served upon was a foreign flagged vessel, it was not part of the U.S. merchant marine. This is because U.S. merchant marine vessels are under U.S. registry and therefore, fly the American flag.³⁴

As the above analysis reflects, what is determinative regarding if a vessel is or is not within the U.S. merchant marine is not simply whether it is engaged in 'commerce' as the Division suggests.³⁵ Instead, what is determinative is whether it is U.S. owned, registered, and flagged, and may also be called into assistance by the United States government in national defense at time of war and national emergency. Obviously, there is little doubt that ships which are owned by the Military Sealift Command or Naval Fleet Auxiliary Force can be called into service during time of war or national emergency. As such, as to the USNS Vessel A, the answers to all the above-referenced questions are a resounding yes. Because of this, the USNS Vessel A is properly considered part of the U.S. merchant marine.

Mr. H's service aboard the ship as a merchant mariner during the 2019 qualifying year

³¹ *In re HLX* at 2.

³² *In re HLX* at 2.

³³ Ex. 11 at pp. 5-7; *see generally*, *In re KJ*, OAH Case No. 13-1599-PFD (Dep't of Rev., March 2014) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5641>).

³⁴ *In re KJ* at 2.

³⁵ Even if 'commerce' were the test as the Division suggests, it is quite arguable that a U.S. naval supply and replenishment oiler ship, as the USNS Vessel A is properly characterized, Ex. 18, is in fact, engaged in commerce. Obviously, it or the Military Sealift Command likely acquires its cargo somewhere along a commodity supply chain before transporting it to Naval ships. Simply because the USNS Vessel A then ultimately supplies its cargo to the Navy does not mean that it has not engaged in 'commerce' in doing so. Commerce is simply "the exchange or buying and selling of commodities on a large scale involving transportation from place to place." *Merriam-Webster* (2021).

does not make him ineligible for a PFD. Such a result is consistent with the intent and purpose of AS 43.23.008(a)(4),³⁶ previous decisions of the Office of Administrative Hearings as delegate of the Commissioner of Revenue interpreting the statute,³⁷ the previous position taken by the Division as to Mr. H in at least a portion of prior years,³⁸ and the Division's position in at least one other case on virtually identical facts.³⁹

IV. Conclusion

Mr. H's time spent outside of Alaska in 2019 while serving as a merchant marine aboard the USNS Vessel A qualifies as an allowed absence per AS 43.23.008(a)(4). Accordingly, the Division's denial of his 2020 PFD application is REVERSED.

DATED this 12th day of February 2021.

By: Signed
Z. Kent Sullivan
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 and Order 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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of March, 2021.

By: Signed
Signature
Mike Barnhill
Name
Deputy Commissioner
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

³⁶ Exs. 19-20.

³⁷ See generally, *In re J.C.*; *In re HLX*; and *In re K.J.*

³⁸ Division Position Statement at p. 5.

³⁹ *In re J.C.* at 3.