

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

In the Matter of:)	
)	
E.K. and B.H.)	OAH No. 15-1371-PFD
)	Agency No. 2014-050-5137/0273
_____)	

DECISION AND ORDER

I. Introduction

Husband and wife E.K. and B.H. challenge the Permanent Fund Division's (division's) denial of their 2014 Permanent Fund Dividend (PFD) applications. The division denied E.K.'s application because it determined that he was not eligible for the 2014 PFD because he had not been physically present in Alaska for at least 30 days in the preceding five years. B.H. is only eligible for a PFD if she is accompanying an eligible spouse. Therefore, if E.K. is ineligible, so is B.H. A hearing was held on November 23, 2015. E.K.'s application is denied because he did not meet the 30-day requirement of AS 43.23.008(d)(1). B.H.'s application is denied because she was not absent accompanying an eligible spouse.

II. Facts

The facts in this case are not in dispute. The dispute is over the law as applied to those facts.

E.K. is in the military. He has been absent from Alaska for over 10 years. B.H. has accompanied her husband while he was assigned out-of-state. In the past few years, the family have been unable to return due to unavoidable circumstances and have maintained residency.¹ During all times relevant, E.K. and B.H. own a home in Alaska, have vehicles registered in Alaska, and are registered to vote in Alaska. B.H.'s family remains in Alaska. Once E.K. retired, they returned to Alaska and reside in the home they have owned for a number of years. However, E.K. has not been physically present in Alaska for at least 30 consecutive days in the five years prior to his 2014 PFD application.² For this reason, the

¹ *In re DJ and A G-J*, OAH No. 12-0129-PFD (Comm. of Revenue July 23, 2012); *see also* Exh. 8 at pp. 53-61.

² AS 43.23.008(d)(1).

division found him ineligible for a 2014 PFD. B.H.'s absence is allowable only if she is accompanying an eligible spouse.³

E.K. and B.H. agree that if the statute relied upon by the division applies to them, then they are ineligible. However, they argue that it cannot be applied to them because to do so would violate the State Constitution's prohibition on *ex post facto* laws, and because the 30-day requirement cannot be reconciled with the 72-hour requirement found at AS 43.23.005(a)(4).

III. Discussion

The issues presented here are whether the 2014 PFD application of E.K. was correctly denied and, if so, B.H.'s respective 2014 PFD application was also correctly denied.

In this appeal, E.K. has the burden of proving that the Division erred in its denial of his 2014 PFD application.⁴ Under AS 43.23.008(d), the department will presume that an individual who has been absent from the state for more than 180 days in each of the five preceding qualifying years is no longer a state resident.⁵ In order to rebut that presumption, E.K. needs to prove, by clear and convincing evidence, that he was physically present in Alaska for at least 30 cumulative days during the past five calendar years -- here, the years from 2009 to 2013.⁶ B.H.'s respective claim is dependent upon the validity of E.K.'s claim: she can only be eligible for the 2014 PFD by virtue of her status as a family member accompanying another potentially eligible resident (*i.e.*, E.K.) with an excusable absence.⁷

A. E.K.'s Eligibility

The qualifying year for the 2014 dividend was calendar year 2013.⁸ To continue to be considered a state resident for purposes of the PFD program, an individual absent from the state for more than 180 days in each of the five preceding qualifying years must meet two requirements.⁹ First, the individual must be physically present in the state for *at least* 30 cumulative days during the past five years.¹⁰ Second, the individual must be physically present in the state with the intent to remain indefinitely in the state under the requirements of AS

³ AS 43.23.008(a)(3).

⁴ 15 AAC 05.030(h).

⁵ AS 43.23.008.

⁶ AS 43.23.008(d).

⁷ AS 43.23.008(13); *see also* AS 43.23.008(a)(3)(B).

⁸ AS 43.23.095(5).

⁹ AS 43.23.008(d).

¹⁰ AS 43.23.008(d)(1).

01.10.055 or, if not physically present in the state, must intend to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055.¹¹

The first requirement only looks at whether the number of days an applicant has been physical present in the state total at least 30 days during the preceding five years. An applicant could have a legitimate excuse five years in a row for his or her absences from Alaska, but if he or she was not present in the state at least 30 days during those years, the applicant will nevertheless lose Alaskan residency for PFD purposes, and therefore become ineligible to receive a PFD.

The narrow scope of the statute does not allow for other factors to mitigate the 30-day requirement. This “bright line” rule is the result of legislation which codified a previous regulation into a statute. When the 28th Legislature enacted this legislation,¹² it removed the clause from the regulation that allowed an individual to receive a PFD if the individual showed to the department’s satisfaction that **unavoidable circumstances** prevented that individual from returning for at least 30 cumulative days during the past five years.¹³ By *striking* this section from the new law, the legislature clarified its intent to make the 30-day requirement inflexible.

It is uncontested that E.K. does not meet the first statutory requirement of AS 42.23.008(d). Both he and the division agree that he was physically present in Alaska for less than 30 days during the five years preceding his 2014 PFD application. While E.K. provided sufficient evidence that his employment prevented him from returning to Alaska for the necessary additional days,¹⁴ nothing in the statute permits a deviation from the 30-day requirement. Without an explicit statutory exception, the inquiry ends. There is no ambiguity in the statute.

E.K. and B.H. believe application of this legislative change was unconstitutional and a violation of the prohibition on *ex post facto* laws.¹⁵ A statute is not illegally retrospective merely because it upsets expectations. Rather, in determining whether a statute affecting

¹¹ AS 43.23.008(d)(2); AS 43.23.095(7).

¹² 2013 Alaska Sess. L. Ch. 33. §2.

¹³ Division’s Position Statement, p.3 (emphasis added).

¹⁴ *In re DJ and A G-J*, OAH No. 12-0129-PFD (Comm. Of Revenue July 23, 2012); *see also* Exh. 8 at pp. 53 61.

¹⁵ No...*ex post facto* law shall be passed....” Alaska State Constitution Article 1, § 15, Prohibit State Action.

pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights.¹⁶ Here, the family had no vested right.¹⁷

Moreover, their challenge to the language of the statute is a facial challenge.¹⁸ Because the executive branch of government must follow laws enacted by the legislature, not nullify them, facial constitutional challenges of statutes are solely the province of the courts, and cannot be addressed at this level.¹⁹

E.K. argues that he is no less qualified as a resident of Alaska in 2014 than he was in 2013, since at that time he had also been absent from Alaska for five years without being physically present for 30 days, yet he was approved for the 2013 PFD. This apparent inconsistency is also clarified by the 2013 legislation, which specified that it “may not be applied to make ineligible any person otherwise eligible for a 2013 dividend under AS 43.23.”²⁰ The legislation then states that the sections are to apply retroactively, beginning January 1, 2013, the qualifying year for the 2014 application.²¹ When E.K. applied for the 2013 dividend, the regulation granting an exception for circumstances like E.K.’s situation was still in effect.

Accordingly, 2014 was the first year the mandatory requirement of spending 30 cumulative days in Alaska during the preceding five years was applied to applicants living outside of the state for more than 180 days in each of the five preceding qualifying years. It was, therefore, the first time E.K. could have been precluded from receiving a PFD due to his extended physical absence from Alaska. Because E.K. was not in Alaska for at least 30 cumulative days during the past five years, he does not meet the first requirement, and thus is unable to rebut the presumption that he is no longer an Alaska resident for PFD purposes.

It should be noted that E.K. provided more than adequate evidence to meet the second requirement: his intent to return to the state and remain indefinitely. The Family have gone to

¹⁶ *Underwood v. State*, 881 P.2d 322, 327 (Alaska 1994) certiorari denied 115 S.Ct. 1694, 514 U.S. 1064, 131 L.Ed.2d 558 (statute changing eligibility requirement for PFD was not *ex post facto* where at time of amendment no Alaskan had a vested right to a dividend, and change did not unfairly or unreasonably impinge upon any property rights or settled expectations).

¹⁷ *Id.*

¹⁸ *See, e.g., Khodara Environmental, Inc. ex rel. Eagle Environmental LLP v. Beckman*, 237 F.3d 186, 193 (3d Cir. 2001).

¹⁹ *See In re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Econ. Dev., adopted Sept. 4, 2009), at 5 (<http://aws.state.ak.us/officeofadminhearings/Documents/TOB/TOB080245.pdf>).

²⁰ 2013 Alaska Sess. L. Ch. 33, §6.

²¹ 2013 Alaska Sess. L. Ch. 33, §2 (transition notes).

great lengths to maintain their state voting rights, they have their vehicles licensed in Alaska, and they have maintained a home that they have since retired to. However, under the current law, without meeting the first requirement, E.K. cannot refute the division's presumption that he is no longer a state resident.

E.K. has, therefore, not met his burden in refuting the division's presumption, and thus is no longer a state resident for purposes of PFD eligibility.

B. B.H.' Eligibility

B.H., like E.K., was absent from the state more than 180 days in the qualifying year (2013), and thus would not normally be eligible for the 2014 PFD.²² However, she can still qualify for the 2014 PFD if she is the spouse or minor dependent of an individual who is eligible for a current year dividend.²³ Because E.K. is no longer an Alaska resident for PFD purposes, he is not eligible for the dividend.²⁴ As a result, B.H. was not accompanying an eligible resident during the qualifying year, and is, therefore, also ineligible.

C. The 30-Day Requirement In AS 43.23.008(d) Does Not Conflict With The 72 Hour Requirement In AS 43.23.005(a)(4).

Most allowable absences are not without limits. One such limit is found at AS 43.23.005(a)(4). This statute provides that a person who is allowably absent must return "for at least 72 consecutive hours at some time during the prior two years before the current dividend year."²⁵ Another such limit is found at AS 43.23.008(d). This statute provides that a person who is otherwise allowably absent must return to Alaska for at least 30 days in the preceding five year period.

Recognizing that there are times when circumstances may not permit members of the armed forces and their families to return for 72 consecutive hours, the law permits the Commissioner of Revenue to waive the 72-hour requirement in a time of national military emergency.²⁶ The Legislature did not provide an exception for the 30-day requirement.

E.K. argues that these two provisions are in conflict because there cannot be a 72-hour requirement and a 30-day requirement applied to the same PFD period. His argument is

²² 15 AAC 23.163(b)(1).

²³ AS 43.23.008(a)(13); *see also* AS 43.23.008(3).

²⁴ AS 01.10.055(c).

²⁵ AS 42.23.005(a)(4).

²⁶ AS 43.23.005(f).

incorrect. For example, E.K. could have been physically present for a cumulative 30 days in the five year period at issue and only 72 hours in 2012 and 2013. The three days would be included in the 30 days. They are not mutually exclusive.

IV. Conclusion

Because of his extended absence, E.K. is not eligible for the 2014 PFD. As a result, B.H. is also not eligible for the 2014 PFD.

The decision of the Permanent Fund Dividend Division to deny the applications of E.K. and B.H. for the 2014 Permanent Fund Dividend is AFFIRMED.

DATED: February 16, 2016.

Signed

Rebecca L. Pauli
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 23rd day of March, 2016.

By: Signed

Signature
Jerry Burnett

Name
Deputy Commissioner

Title

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