

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

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|-------------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| N. J. |) | OAH No. 24-0456-PFD |
| |) | |
| <u>2023 Permanent Fund Dividend</u> |) | |

DECISION

I. Introduction

In 2022, N. J. spent 189 days outside Alaska while working for a private defense contractor on a mobile oceangoing radar platform owned by the United States Department of Defense. Initially, the Department of Revenue’s Permanent Fund Division (the “Division”) did not believe this impacted Mr. J.’s eligibility to receive the 2023 Permanent Fund Dividend (“PFD”) due to a statute which provides that time an Alaska resident serves on board “an oceangoing vessel of the United States merchant marine” is considered an allowable absence for PFD purposes.¹ However, Mr. J. spent an additional 56 days outside the state for reasons that were not considered allowable by the Division, which denied his 2023 PFD application on that basis.² After Mr. J. appealed this denial, the Division made the additional determination that the radar platform on which he served was not a merchant marine vessel for which an allowable absence could be recognized.

Since it is undisputed that the radar platform on which Mr. J. served has no commerce function whatsoever, the Division correctly determined that it was not a merchant marine vessel. The Division was additionally correct in its initial determination that Mr. J. was ineligible on account of the additional 56 days he spent outside Alaska. Accordingly, the Division’s denial of Mr. J.’s 2023 PFD application is affirmed.

II. Facts

Mr. J. is a lifelong Alaska resident who began working as a mariner in 2005.³ In 2015, he began employment with a private defense contractor as a marine engineer on the

¹ AS 43.23.008(a)(4).

² Under AS 43.23.008(a)(17)(C), Mr. J. could only be absent for an additional 45 days in order to retain his PFD eligibility.

³ Division Position Statement at p. 1.

USNS Vessel 1.⁴ The Vessel 1 is a one-of-a-kind seagoing radar facility that began its life as a 50,000-ton semi-submersible oil platform. In 2003 the Missile Defense Agency acquired the platform from a Norwegian company and thereafter spent over \$900 million converting it into a radar facility capable of tracking ballistic missiles.⁵ A crew of over 80 officers, civilians and contractor personnel is required to operate and maintain this oceangoing platform and the radar equipment mounted upon it.⁶ The following photo demonstrates the extent to which the Vessel has been constructed to serve an exclusively military purpose:



Believing the time he spent on the Vessel 1 was an allowable absence under the merchant marine exception mentioned above, Mr. J. applied for and received PFDs from

⁴ Mr. J. testimony. USNS is the abbreviation for “United States Naval Ship.” See Exhibit 8 at p. 1. The Vessel 1 was transferred to the Military Sealift Command in December 2011, which is responsible for operating and maintaining the platform’s hull, engines, and navigation systems. The Missile Defense Agency operates and maintains the radar equipment. Exhibit 8 at p. 2.

⁵ See [REDACTED]

⁶ Exhibit 8 at pp. 1-7.

2016 through 2022.⁷ In applying for his 2023 PFD, Mr. J. disclosed that he had been absent from Alaska for a total of 245 days, with 189 of those spent on the Vessel 1. Of the remaining 56 days he spent outside Alaska, Mr. J. indicated that 4 days were for a vacation. No reasons were given for the other 52 days he was outside the state.⁸

These additional days outside Alaska caught the Division's attention, since a person who is allowably absent for more than 180 days under the merchant marine exception is ineligible for a PFD if he or she is absent more than 45 additional days for reasons that are not excused by other statutory exemptions.⁹ Because Mr. J. did not provide any information indicating that the additional 56 days he spent outside Alaska qualified as an allowable absence, the Division denied his application on that basis.¹⁰

Mr. J. timely filed an informal appeal in response to this denial. In this appeal, Mr. J. explained that in addition to the days he was physically present on the Vessel 1, he spent an additional 18 days in transit between the platform and the nearest port during regular crew rotations.¹¹ As Mr. J. explained during his hearing testimony, when the Vessel 1 is at sea it is typically situated in areas of the Pacific Ocean that are hundreds of miles from the nearest port. Thus, during a crew rotation the incoming personnel must spend several days at sea on an offshore supply vessel that transports them to the platform – with the outgoing crew likewise spending several days in transit returning to port. Mr. J. argues that the additional days he spent going to and from the Vessel 1 should also be counted as time spent on a merchant marine vessel. The Division rejected this argument, and Mr. J. timely requested a formal hearing in response. In documents Mr. J. submitted with his hearing request, he acknowledged spending a total of 39 days outside Alaska for personal vacations during 2022.¹²

In preparing for the formal hearing, the Division took a closer look at the Vessel 1 and concluded that it did not qualify as a merchant marine vessel for purposes of the

⁷ Division Position Statement at p. 1; Mr. J. testimony.

⁸ Exhibit 1 at p. 5.

⁹ AS 43.23.008(a)(17)(C).

¹⁰ Exhibit 3.

¹¹ Exhibit 6 at p. 3. The math is confused to a small extent here by the fact Mr. J. claimed to have spent 189 days on the Vessel 1 in his PFD application, but reduced that figure to 188 days in his subsequent appeals. Since this difference does not impact the outcome here, for sake of consistency this decision relies on the information as originally reported in Mr. J.'s PFD application.

¹² Exhibit 6 at p. 4.

statutory exemption. The Division notified Mr. J. of its position on this issue in advance of the hearing, and Mr. J. was well-prepared to address it when the hearing was held on August 27, 2024.¹³ At the hearing the Division was represented by PFD Specialist Peter Scott; Mr. J. represented himself and offered sworn testimony. Twenty-one exhibits offered by the parties were admitted into evidence.

III. Discussion

A. The fact Mr. J.'s prior PFD applications were accepted by the Division is not controlling here.

It is undisputed that Mr. J. received PFDs in prior years based on the Division's assumption that the Vessel 1 qualified as a merchant marine vessel. However, this does not limit the arguments the Division can assert in this appeal. As noted in past administrative decisions, "even if the PFD Division overlooks a defect in an application in one year, it is not barred from correcting that error in a later year."¹⁴

B. The Vessel 1 is not a merchant marine vessel since it does not transport passengers or cargo.

The qualifying year for the 2023 dividend was 2022.¹⁵ To be eligible for a 2023 dividend, Mr. J. could not be absent from Alaska for more than 180 days during 2022 unless his circumstances fit one of allowable absence categories listed in the PFD statutes.¹⁶ The single allowable absence provision at issue here is found at AS 43.23.008(a)(4), which provides in relevant part:

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 coast articles of employment aboard an oceangoing vessel of the United States merchant marine.

As noted in past administrative decisions, whether a vessel is considered part of the United States merchant marine is "generally a matter of maritime custom" since there is no

¹³ Mr. J. submitted a four-page written statement in advance of the hearing that was largely devoted to the question of whether the Vessel 1 was a merchant marine vessel, along with five exhibits.

¹⁴ See *In re K.L.B.*, OAH No. 08-0669-PFD (Dept. of Revenue 2009) (noting that the Division's authority to reassess past eligibility determinations is implicitly recognized by AS 43.23.035) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5295>).

¹⁵ AS 43.23.095(6)

¹⁶ AS 43.23.008

federal statute or regulation that definitively classifies the types of vessels that are considered part of the merchant marine.¹⁷ While the United States Maritime Administration (“MARAD”) maintains a list of American flagged cargo vessels,¹⁸ this list has some notable gaps since it does not include government owned vessels, oceangoing tugs that tow cargo barges, or vessels below 1,000 gross registered tons.¹⁹ It is clear, however, that a ship must carry an American flag to be considered a part of this nation’s merchant marine. Thus, periods of time that a PFD applicant spends aboard a foreign flagged vessel does not count for purposes of this exemption.²⁰

Even if a vessel carries an American flag, it is not considered to be part of the United States merchant marine unless it is also engaged in the transportation of passengers or cargo. This is a concept recognized by MARAD, which describes this nation’s merchant marine as follows:

The [United States Merchant Marine] is managed by the Department of Transportation's Maritime Administration (MARAD) and consists of privately-owned, *U.S.-registered merchant ships and vessels that provide waterborne transportation for passengers and cargo moving in domestic and international commerce.*²¹

In keeping with these concepts, past administrative decisions interpreting AS 43.23.008(a)(4) have evaluated the purpose to which a vessel was put in determining whether time serving aboard it could be considered an allowable absence. The operative rule emerging from these cases is that a vessel must be utilized to transport passengers or cargo in domestic or international commerce to be considered part of the United States merchant marine.²² This holds true even if the vessel in question is owned by the United

¹⁷ *In re E. and N.X.*, PFD Decision 020073 (Dept. of Revenue 2002) (included in the record here as Exhibit 12).

¹⁸ This list is available at <https://www.maritime.dot.gov/data-reports/data-statistics/us-flag-fleet-pdf-01-2022>.

¹⁹ See also Exhibit C (noting American flagged merchant vessels with open mariner positions that do not appear on MARAD’s list).

²⁰ *In re G.B. Jr.*, OAH No. 05-0065-PFD (Dept. of Revenue 2005) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5079>); *In re K.J.*, OAH No. 13-1599-PFD (Dept. of Revenue 2014) (available at <https://aws.state.ak.us/OAH/Decision/Display?rec=5641>).

²¹ See <https://www.maritime.dot.gov/outreach/military-mariner> (emphasis added). Similarly, the United States Merchant Marine Academy notes that the United States Merchant Marine is comprised of American flagged vessels engaged in the transportation good and commodities. See Exhibit 13.

²² *In re C.X.*, OAH No. 20-0292-PFD (Dept. of Revenue 2020) (government owned research vessel was not considered part of the U.S. merchant marine since it was not utilized for commerce purposes) (available at <https://aws.state.ak.us/OAH/Decision/Display?rec=6614>).

States government.²³ Quite simply, if a vessel does not have a merchant purpose, then it is not part of the merchant marine.

Here, it is self-evident that that the Vessel 1 is not a merchant vessel utilized for the purpose of transporting passengers or cargo in domestic or foreign commerce. It is instead a mobile radar platform that serves a uniquely military purpose, and as such, cannot be considered a part of the United States merchant marine. Accordingly, Mr. J.'s time aboard the Vessel 1 does not count as an allowable absence under AS 43.23.008(a)(4).

C. Even if the Vessel 1 could be classified as a merchant marine vessel, Mr. J. would not be eligible for the 2023 PFD.

In crafting AS 43.23.008(a)(4), the legislature specifically limited this allowable absence to the times when a PFD applicant was “serving under foreign or coast articles of employment.” In the maritime context, the phrase “articles of employment” refers to the contract of maritime employment between a seaman and the owner or master of a vessel under 46 U.S.C. § 10502 (for coastwise voyages) or 46 U.S.C. § 10302 (foreign and intercoastal voyages). These statutes provide that articles must be entered into “with each seaman before the seaman commences employment.”²⁴ A seaman stops being subject to articles of employment when issued a “certificate of discharge” upon the seaman’s departure from the vessel.²⁵ Consistent with these legal requirements, Mr. J. signed articles of employment each time he boarded the Vessel 1, and was issued a certificate of discharge immediately prior to departing the platform at the end of his work rotation.²⁶

In clear and unambiguous manner, the legislature chose to limit the allowable absence recognized by AS 43.23.008(a)(4) to times when a mariner is “serving aboard” a vessel under articles of employment. The Division does not have the discretion to ignore this requirement, or enforce it in a manner that creates new and unauthorized categories of allowable absence. For this reason, past administrative decisions have found that time a

²³ *In re K.H., Jr.*, 20-0934-PFD (Dept. of Revenue 2020) (merchant vessel owned by the Military Sealift Command used to transport cargo for the U.S. Navy deemed part of the U.S. merchant marine for purposes of AS 43.23.008(a)(4)) (available at <https://aws.state.ak.us/OAH/Decision/Display?rec=6703>).

²⁴ 46 U.S.C. § 10502(a); 46 U.S.C. § 10302(a).

²⁵ 46 U.S.C. § 10311(a); 46 U.S.C. § 10504(b) (requiring a seaman’s wages to be promptly paid after being discharged from a vessel).

²⁶ Mr. J. testimony. Copies of the certificates of discharge that were issued to Mr. J. in 2022 were part of the record here. *See* Exhibit 6 at pp. 6-8.

mariner spends outside Alaska between voyages is not an allowable absence under AS 43.23.008(a)(4).²⁷

While Mr. J.'s situation is unique in the sense that he was at sea for several days while getting to and from the Vessel 1, this was time he spent as a passenger, not a crew member. Even though Mr. J. was paid for this transit time, he was no longer serving under "articles of employment" as that phrase is used in maritime law. Accordingly, those days cannot be counted as excusable here. This means Mr. J. would be ineligible for the 2023 PFD even if it was possible to classify the Vessel 1 as a merchant marine vessel. This result follows from the fact the 18 days Mr. J. spent in transit to and from the Vessel 1, plus the 39 days he was vacationing outside Alaska, exceeds the 45 days of additional absence allowed under AS 43.23.008(a)(17)(C).

While the straightforward language of AS 43.23.008(a)(4) arguably creates some degree of hardship for merchant mariners who spend days traveling between voyages, this is largely mitigated by the fact they can spend up to 45 additional days outside Alaska without losing their PFD eligibility. Here, for example, Mr. J. could have spent up to 27 days on vacations outside Alaska without impacting his PFD eligibility.

IV. Conclusion

Since the Vessel 1 is not part of the United State merchant marine, the 189 days Mr. J. spent at sea aboard this radar platform in 2022 cannot be deemed an allowable absence under AS 43.23.008(a)(4). Even if it were possible to characterize an oceangoing military radar platform as a merchant vessel, the fact Mr. J. was absent from Alaska for 56 additional days would render him ineligible. Accordingly, the Division's denial of Mr. J.'s application for the 2023 Permanent Fund Dividend is AFFIRMED.

²⁷ *In re T.W.*, OAH Case No. 06-0094-PFD (Dept. of Revenue 2006) (time applicant spent in ports outside Alaska between voyages was not excusable) (available at <https://aws.state.ak.us/OAH/Decision/Display?rec=5145>); *in re J.C.*, OAH Case No. 09-0307-PFD (Dept. of Revenue 2009) (time mariner spent between ship assignments was not excusable, notwithstanding fact he was not permitted by his employer to return to Alaska during these periods) (available at <https://aws.state.ak.us/OAH/Decision/Display?rec=5399>).

Dated: September 30, 2024

By: Signed
Signature
Max A. Garner
Name
Administrative Law Judge
Title

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

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 4th day of November, 2024.

By: Signed
Signature
Adam R. Crum
Name
Commissioner of Revenue
Title