

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Albert and Rose Sears, )  
 )  
 Appellants, )  
 vs. )  
 )  
 State of Alaska, Department )  
 of Revenue, Permanent Fund )  
 Dividend Division, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

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ALASKA DEPT. OF REVENUE  
PFD DIVISION  
DIVIDEND APPEALS

Case No. 3AN-03-6987 Civil

**ORDER ON APPEAL TO THE SUPERIOR COURT FROM STATE OF  
ALASKA, DEPARTMENT OF REVENUE, PERMANENT FUND  
DIVIDEND DIVISION**

**INTRODUCTION**

Albert and Rose Sears appeal from the State of Alaska, Department of Revenue's formal administrative hearing decision, which denied them permanent fund dividends in 2001. They challenge the statutory law that prohibits absences based on a medical need for climatic change and the Department's interpretation of state residency. For the reasons stated below, the court affirms the Department's decision.

**FACTS AND PROCEEDINGS**

In 1995, Appellants, Albert and Rose Sears left Alaska upon the advice of a doctor who suggested that living in a warmer climate during Alaska's cold winter months might improve the arthritis pain from which Mrs. Sears suffers. Due to Mrs. Sears' health complications and her

inability to travel, the Sears were gone over four years, finally moving back to Alaska in June, 2000. Their return lasted only a short while, however. Mrs. Sears left Alaska again in September, 2000 and Mr. Sears left in December, 2000. Although they still consider themselves Alaska residents and desire to live here for six months of the year, they have not returned to Alaska. They currently live in their motor home on their daughter's property in another state.

On April 30, 2002, the Department of Revenue (the "DOR") denied Mr. and Mrs. Sears 2001 permanent fund dividends. The DOR cited several factual reasons for the denial: 1) the Sears had been absent from the state for over four years without returning; 2) they sold their home in Alaska prior to departure and maintained their RV as their principal home in another state; 3) they were not "state residents" during the entire qualifying year; 4) their most recent Alaska residency began on June 18, 2000 after returning from an "unallowable absence"; and 5) Mrs. Sears was absent 276 days in 2000 and Mr. Sears was absent 186 days in 2000.

Appellants do not dispute the DOR's accounting of the dates that they were physically present in Alaska, nor do they dispute that the current law does not recognize the reason for their absence. Instead, they challenge the validity of AS 43.23.008(a)(5), which excludes doctor recommended absences from the state based on a need for climatic

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change. They also challenge the DOR's findings that they were no longer residents for PFD purposes in 2001. They assert that they have always been Alaska residents and continue to retain their residency status because they have not declared residency in any other state. In addition, they have personal and household items in a storage unit in Anchorage and hope to return to Alaska for the warm parts of the year provided Mrs. Sears can get the medical treatments she needs in Anchorage.

The Sears filed an informal appeal, but on August 29, 2002 the DOR affirmed. Next, the Sears requested a formal hearing, which the DOR granted. Mrs. Sears testified telephonically in this hearing. On December 19, 2002, the DOR issued a final administrative decision affirming its original decision. The Sears then filed a Notice of Appeal to this court in April of 2003, challenging the DOR's final decision pursuant to ARAP 601-612.

### DISCUSSION

**a. Standard of review.** There are four standards of review for administrative decisions. These include: the "substantial evidence" test for questions of fact; the "reasonable basis" test for questions of law involving agency expertise; the "substitution of judgment" test for questions of law where no expertise is involved and the "reasonable and

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not arbitrary” test for review of administrative regulations.<sup>1</sup> Two of the four standards are applicable here.

First, the court will inquire whether substantial evidence supports the DOR’s factual findings. “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”<sup>2</sup> The court will neither choose between competing inferences, nor weigh the strength of the evidence, but merely discern whether the evidence exists.<sup>3</sup> Next, the court will apply the “substitution of judgment” standard and to the agency’s legal conclusions. The substitution of judgment standard is appropriate with regard to “issues of law not involving agency expertise, such as statutory interpretation and constitutional claims.”<sup>4</sup>

**b. PFD Eligibility.** A person is eligible for a dividend if he or she complies with the statutory requirements of AS 43.23.005. The requirements are many, but those in dispute in this case include whether the Sears were state residents during the entire qualifying year, whether they were state residents on the date of application; and whether they were physically present in the state at all times during the

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<sup>1</sup> *Handley v. State Department of Revenue*, 838 P.2d 1231, 1232 (Alaska 1992) (citing *Jager v. State*, 537 P.2d 1100, 1007 n. 23 (Alaska 1975)).

<sup>2</sup> *Handley*, 838 P.2d at 1232 (citations omitted).

<sup>3</sup> *Id.* (citations omitted).

<sup>4</sup> *Church v. State Dept. of Revenue*, 973 P.2d 1125, 1127 (Alaska 1999).

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qualifying year or, if absent, only as allowed in AS 43.23.008.<sup>5</sup> There are thirteen enumerated “allowable absences” listed under AS 43.23.008 and one catch-all provision allowing absences for other reasons, but not to exceed 180 days.<sup>6</sup> AS 43.23.008(a)(5) states that a person absent from the state may remain eligible for dividends if she is “receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician that treated the illness if the treatment or convalescence is not based on a need for climatic change.”

**c. Absences based on need for climatic change.** Appellants’ challenge to the exclusion of climatic change as an allowable absence is one which the Alaska Supreme Court has already addressed. In *Brodigan v. Alaska Department of Revenue*, the court reviewed a situation in which the DOR denied the Brodigans’ dividends due to an unallowable absence.<sup>7</sup> In response to the denial, the Brodigans asserted that their absence was a result of necessary “medical treatment.” They explained that a doctor recommended that due to Mr. Brodigan’s health complications, that the couple spend the winter months outside Alaska in a warmer climate. The court upheld the DOR’s decision and the Superior court’s interpretation that “[t]reatment means just that. It

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<sup>5</sup> AS 43.23.005. Other requirements mentioned in AS 43.23.005 but not at issue include whether the applicant is a U.S. citizen, whether the applicant is in compliance with military selective service registration requirements, a member of the military, a parent or representative of a minor who qualifies for a PFD or a convicted felon.

<sup>6</sup> AS 43.23.008(a)(1)-(13) and (14)(A).

<sup>7</sup> 900 P.2d 728 (Alaska 1995).

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implies some specific therapeutic application by medical personnel....”

Even though the absence was medically advised, the court found that the DOR did not abuse its discretion by finding that the “Brodigans did not qualify for an allowable absence for ‘medical treatment.’”

Here, Appellants left Alaska in 1995 based on the advice of a physician that Mrs. Sears spend the winter in a warmer climate outside Alaska. Although this move was related to Mrs. Sears’ health, Appellants did not leave Alaska to pursue a specific therapeutic procedure that the Alaska statutes recognize. They returned to Alaska in June of 2000, but because the length of their absence exceeded 180 days and the reason for the absence was not allowable, Appellants were not eligible for the 2001 PFD.

Appellants do not dispute that they left Alaska for more than 180 days and that they left initially to seek warmer climates for Mrs. Sears. As such, the DOR’s findings of fact are supported by substantial evidence and based on a correct application of AS 43.23.008(a)(5). The statutory requirements that exclude absences based on a medical need for climate change, while disagreeable to Appellants, nevertheless further the State’s legitimate interest “in promoting Alaska residency, preventing fraud in the distributions of PFDs, and simplifying its adjudication procedures.”<sup>8</sup>

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<sup>8</sup> *Id.*

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**d. Residency requirements.** Appellants challenge the DOR's finding that they were not state residents during the qualifying year for the 2001 dividend and not state residents on the date of their application. The DOR found that the Sears were residents from 1971 to 1995, but that in 1995 when they sold their home, left Alaska and did not return until June of 2000, that they had lost their state residency for PFD purposes. Although Appellants concede that they were absent from the state for over four years, they assert that their intention always was to return to the state and that they purposefully did not establish residency in another state during that time. The DOR found that even though Appellants' subjective intent was to return to Alaska, objective facts evidencing a four-year absence disqualified them from the 2001 PFD and further evidence suggested that it was unlikely they would return and remain indefinitely.

The DOR made a residency determination based on applicable Alaska statutes and its own regulations. First, it looked to the definition of "state resident" in AS 43.23.095(7):

an individual who is physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055.

Next, it reviewed AS 01.10.055, which explains that a person who is physically present in the state with the intent to remain indefinitely

demonstrates "intent" by maintaining a principal place of abode in the state for at least 30 days and by providing proof that the person did not claim residency or obtain benefits from another state.<sup>9</sup> Once a person establishes residency, that person remains a resident even during absences from the state unless "during the absence [he or she] establishes residency in another state . . . or performs other acts or is absent under circumstances that are inconsistent with the intent [to remain indefinitely]."<sup>10</sup> Last, the DOR consulted its own regulations that consider whether an applicant maintained "customary ties indicative of Alaska residency and the absence of those ties elsewhere."<sup>11</sup> The regulations reiterate that a person is not eligible for a dividend if "any time from January 1 of the qualifying year through the date of application, the individual has maintained [her] principal home in another state or country" for a reason not listed in AS 43.23.008, or "moved from Alaska for a reason other than one listed in AS 43.23.008...."<sup>12</sup>

**1) Appellants absence exceeded 180 days.** Appellants returned to Alaska on June 18, 2000, after having been gone over four years. This prolonged absence for more than 180 days, which was not allowable by statute because it did not constitute "medical treatment," disqualified

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<sup>9</sup> AS 01.10.055 (a);(b)(1)(2).

<sup>10</sup> AS 01.10.055(c).

<sup>11</sup> 15 AAC 23.143(a).

<sup>12</sup> 15 AAC 23.143(d)(1); 15 AAC 23. 143 (d)(10)(A)(i)-(ii).

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them from receiving a 2001 dividend. As the DOR explained in its briefing, "This fact alone is sufficient to trigger their ineligibility to receive a 2001 dividend under 15 AAC 23.143(d)(1)."<sup>13</sup>

In *Church v. State Dept. of Revenue*, the Alaska Supreme Court upheld the DOR's residency regulations even when the regulation was more restrictive than its authorizing statute.<sup>14</sup> It found that the Alaska legislature gave the DOR commissioner "broad discretion to . . . determine the factors which define a permanent resident."<sup>15</sup> It continued, "Requiring those not otherwise defined as permanent residents in the statute or regulation to be present in the state for at least 180 days in the year in question is a reasonable interpretation of [the statute's] objectives."<sup>16</sup>

**2) Permanent residency requirement.** The DOR found that the Sears had made their primary residence in another state for those four years and that regardless of their subjective intent, it was unlikely that they would return to Alaska with the intent to remain indefinitely. The DOR based its decision on Mrs. Sears' testimony in the Formal Hearing. She testified that: 1) her arthritis prevents her from living in cold climates during the winter months; 2) her renal failure, which requires regular dialysis treatments, often prevents her from returning to

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<sup>13</sup> Brief of Appellee, p.14.

<sup>14</sup> *Church v. State Dept. of Revenue*, 973 P.2d 1125, 1129 (Alaska 1999).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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Anchorage in the spring due to a long waiting list for such treatments; and 3) her need for these regular treatments makes travel back to Alaska in the motor home difficult. The DOR's findings of fact that Appellants would not likely be able to re-establish residency is based on this testimony.

In *State Dept. of Revenue v. Cosio*, the Alaska Supreme Court upheld the DOR's definition of permanent resident "with regard to one's *ability* to remain permanently."<sup>17</sup> It stated that the definition was rational because "one's 'intent to remain permanently' means little without the . . . ability to effectuate that intent."<sup>18</sup> Although the Sears want to return for six months out of the year, circumstances beyond their control have thwarted such a return and will likely continue to do so. The DOR's finding that the Sears may not have the ability to re-establish residency is supported by substantial evidence.

Last, Appellants assert that not only have they retained their Alaska residency, but that they have also never established residency in another state. The Alaska Supreme Court responded to this same claim in *Brodigan*. It explained that a person may meet the residency requirements for other purposes, but nevertheless fail the more difficult criteria that the DOR establishes for PFD eligibility.<sup>19</sup> Similar to the facts

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<sup>17</sup>*Cosio*, 858 P.2d at 628.

<sup>18</sup>*Id.*

<sup>19</sup>*Brodigan*, 900 P.2d at 733 n.12.

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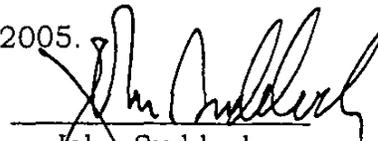
of this case, the court found that "the fact that [Appellants] move their [motor] home with them from place to place outside Alaska and do not establish an outside residence does not prove that they must be Alaska residents [for PFD purposes]." The DOR's interpretation of Alaska's statutory residency requirements meets the substitution of judgment standard of review.

CONCLUSION

Although Appellants may properly consider themselves Alaska residents for other purposes such as voter registration, driver's licensure, and mailing address, they fail to meet the residency requirements for PFD eligibility. The legislature chose to exclude residents who spend at least half the year outside the state for climatic reasons from dividend eligibility. Similarly, it gave the DOR the authority to determine its own residency requirements for individuals to qualify for a PFD.

The DOR's factual findings are supported by substantial evidence and its statutory interpretation meets the substitution of judgment standard of review. For these reasons, the hearing officer's formal administrative decision is affirmed.

Dated this 15<sup>th</sup> day of February, 2005.

  
John Suddock  
Superior Court Judge

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I certify that on 2-15-05  
a copy of the above was mailed to each  
of the following at their addresses of  
record: Albert and Rose Sears  
d/c AS-PDAG/Dept. of Revenue  
Secretary/Deputy Clerk