

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

IN THE MATTER OF

OAH 05-0282-PFD

J. and D. B.

2005 Permanent Fund Dividends

DECISION & ORDER

I. Introduction

J. and D. B. timely applied for 2005 permanent fund dividends. The Permanent Fund Dividend Division determined that Mr. & Ms. B. were not eligible, and it denied the applications initially and at the informal appeal level. Mr. & Ms. B. requested a formal hearing. Administrative Law Judge Mark T. Handley heard the appeal. Mr. and Ms. B. participated. Thomas E. Cote represented the PFD Division by telephone.

This case is Mr. and Ms. B's appeal; of the Division's denial of their 2005 PFD applications because they were absent from Alaska for more than 180 days in 2004. Having reviewed the record in this case and after due deliberation, I conclude that Mr. and Ms. B. are disqualified from receiving 2005 PFDs.

II. Facts

It is undisputed that, during the qualifying year and the application period for a 2005 dividend, Mr. and Ms. B. were absent from Alaska for 350 days so that Mr. B. could attend West Coast Baptist College in California as a full-time student. It is undisputed that the West Coast Baptist College is not accredited by a regional accreditation association and that Alaska Commission on Postsecondary Education has determined that students attending West Coast Baptist College are not eligible for Alaska student loans. It is undisputed that the West Coast Baptist College is not a Title IV institution recognized under 20 U.S.C. 1001 - 1155 and 34 C.F.R., Part 600. It is also undisputed that students attending West Coast Baptist College are not eligible to receive a student loan from Nellie Mae or a student loan from the Educational Resources Institute (TERI).¹

The Division admitted that that Ms. and Ms. B. were Alaska residents and admitted that if West Coast Baptist College had been accredited or their absence was not otherwise disqualifying, Ms. and Ms. B. would be eligible for a 2004 PFD.²

¹ Recording of Hearing.

² Recording of Hearing.

III. Discussion

The division has not raised any question about Mr. & Ms. B.'s status as Alaska residents. The evidence in the file shows that their applications were made in good faith and that they have been entirely truthful, forthcoming and cooperative with the division. Under the law, however, they do not qualify for 2005 PFDs.

Eligibility for permanent fund dividends requires meeting several requirements. They are listed in AS 43.23.005(a). One of the requirements is that the applicant "was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008."³ AS 43.23.008(a) lists a number of reasons a person can be absent from Alaska and still qualify for a dividend. The list includes reasons such as military service, education, serving in Congress, caring for a terminally ill family member, receiving continuous medical treatment, and a few other reasons. Reason number (14) allows absences for any reason consistent with Alaska residency, so long as the cumulative absences total fewer than 180 days, or fewer than 120 days in addition to time in school, or fewer than 45 days in addition to absences for other listed reasons.

The allowable absence reasons listed in AS 43.23.008(a) were selected by the legislature. These reasons have been further defined by regulation.⁴ Many other good reasons an Alaska resident might want to leave the state temporarily are not listed. Every year, people leave Alaska for reasons like volunteering in other states and countries, performing church missions, taking advantage of unique business opportunities, high-level sports competitions like the Olympics, caring for sick or dying friends, or caring for the children of friends with health or other problems. All of these may be good reasons to leave Alaska, but under the law, if the total absences exceed 180 days in the qualifying year, the person will not be eligible for a dividend the next year, regardless of how laudable the reason for the absence.

Mr. B.'s absences fall into this latter category. Regardless of whether the absences were for good reasons, unless the absences fall within one of the fourteen categories listed in AS 43.23.008(a) as those categories have been defined by regulation, Mr. B. would not be eligible for a dividend the next year. No law gives the PFD Division, or the administrative law judge, the legal authority to grant PFDs to people who were absent for reasons, no matter how good, that are not allowable. Mr. and Ms. B.'s absences, taken together, exceed 180 days in 2004; the absences are disqualifying under AS 43.23.008(a)(14)

³ AS 43.23.005(a)(6).

⁴ 15 A A C 23.163.

Mr. B. admitted that his absence did not meet the requirements of AS 43.23.008(a)(1)&(2) which allow an absence for vocational or postsecondary education as those statutes are defined in Alaska Regulation 15 A A G 23.163(c).

15 A A C 23.163(c) provides in pertinent part:

For purposes of

(1) AS 43.23.008 (a)(1), receiving secondary or postsecondary education on a full-time basis means

(A) enrollment and attendance in good standing as a full-time student at an academic institution for any of the 7th - 12th grades consistent with (d) of this section;

(B) enrollment and attendance in good standing, for the purpose of pursuing an associate, baccalaureate, or graduate degree, as a full-time student at a college, university, or junior or community college, accredited by the accreditation association for the region in which the college or university is located, or full-time participation in an internship program if the internship is required for graduation by the college or university; for the purposes of this subparagraph, an individual in the last academic year before graduation who was carrying enough credits to graduate, but fewer than full-time credits for any one term, semester, or quarter, is considered to have been a full-time student at that time; or

(C) enrollment and attendance in good standing, for the purpose of pursuing an associate, baccalaureate, or graduate degree, as a full-time student at a Title IV institution recognized under 20 U.S.C. 1001 - 1155 (The Higher Education Act of 1965) and 34 C.F.R., Part 600 or at a non-accredited college or university if students attending the college or university may qualify as eligible to receive a student loan from Nellie Mae or a student loan from The Educational Resources Institute (TERI);

(2) AS 43.23.008 (a)(2), receiving vocational, professional, or other specific education on a full-time basis means

(A) enrollment and attendance in good standing as a full-time student receiving vocational-technical training as part of a career education program if

(i) the Alaska Commission on Postsecondary Education recognizes the program by granting loans to individuals to attend; and

(ii) the commission states to the department that there is no comparable vocational-technical career education program reasonably available in Alaska;

Mr. B. argued that these regulations are invalid. He argued that the regulations are inconsistent with the statute because they narrowed the statutory allowable absences for vocational

and post secondary education in a way that impermissibly discriminated against those seeking a religious education.⁵

The fact that these regulatory requirements disqualify some deserving individuals who would not be disqualified under the broader language used for the educational absence in the statute does not necessarily make them unreasonable, and therefore invalid.⁶ The Alaska Supreme Court has repeatedly ruled against PFD applicants who have raised statutory and constitutional challenges to the regulations that restrict allowable absences.⁷ The regulations do not on their face discriminate based on the religion of an applicant. They differentiate between attendance at out-of-state schools based on a school's accreditation or its students' eligibility for certain types of loans. Mr. B. has not shown that any impact these regulations might have on an individual's religious practices is intended. A neutral, generally applicable law or regulation does not offend the free exercise clause even if the law has an incidental, that is, unintended effect on religious practice.⁸

IV. Conclusion

While Mr. B.'s reasons for leaving Alaska in 2004 are entirely understandable, they do not fall within the category of absences that are allowable for the purpose of PFD eligibility. Mr. B. therefore does not qualify for 2005 dividend Ms. B.'s eligibility was dependent on her husband's as she was absent to accompany him.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of J.B. for a 2005 permanent fund dividend be AFFIRMED.

DATED this 3rd day of October, 2006.

By: Mark T. Handley
Administrative Law Judge

⁵ Recording of Hearing.

⁶ *State Dept. of Revenue v. Bradley*, 896 P. 2d 237 (Alaska 1995)

⁷ *Church v. State of Alaska; Department of Revenue*, 973 P.2d 1125 (Alaska 1999) & *Eldridge v. State, Dept. of Revenue* 98S P.2d 101 (Alaska 1999).

⁸ *Larson v. Cooper* 90 P.3d 125,128 (Alaska 2004).

Non-Adoption Options

1. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____

make additional findings about _____

conduct the following specific proceedings: _____

DATED this _____ day of _____ 2006.

By: .

Signature

Name

Title

2. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

Evidence herein shows that professional education development under 15AAC23.163 applies.

DATED this 15th day of November, 2006.

By: Tom Boutin

Deputy Commissioner