

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

IN THE MATTER OF)
)
 B. F.)
) Case No. OAH 06-0727-PFD
)
2006 Permanent Fund Dividend)

DECISION & ORDER

I. Introduction

B. F. timely applied for a 2006 permanent fund dividend. The Permanent Fund Dividend Division determined that Ms. F. was not eligible, and it denied the application initially and at the informal appeal level. Ms. F. requested a formal hearing. Administrative Law Judge Dale Whitney heard the appeal on November 29, 2006. Ms. F. appeared by telephone. Susan Lutz represented the PFD Division. The administrative law judge finds Ms. F. to be eligible for a 2006 dividend.

II. Facts

Most of the facts in this case are not in dispute. Ms. F. left Alaska early in January, 2005 to attend college in Hawaii. While attending college Ms. F. met a man, and she married him on May 6, 2005. Ms. F.'s new husband was a military man, but not an Alaska resident. When Ms. F.'s husband received sudden and unexpected orders to Oklahoma, Ms. F. learned that she could complete her degree program entirely through online courses. She therefore left Hawaii with her husband on October 31, 2005, and went to Oklahoma. Ms. F. and her husband stayed in Oklahoma through the date of the hearing, which was November 29, 2006. Ms. F. testified that she and her husband intended to move back to Alaska on December 18, 2006. Ms. F. testified that she would be taking over her father's company, and the couple would be living in Big Lake.

Ms. F. was enrolled and in good standing as a full-time student for the entire time she was in Hawaii. Some of the classes she took were virtual online classes. For these classes, Ms. F. had the option of taking the classes in a traditional classroom format, but she elected the online option so she would have more hours available to work at her part-time job in order to defray the high cost of being a student in Hawaii. These classes did have class meetings with other students, but the meetings were held by internet connection, so that the students could attend while being physically located anywhere. There is no dispute that if the online classes were not counted in the number of credits Ms. F. was enrolled for, she would have been no more than a part-time student the entire year of 2005.

III. Discussion

In order to qualify for a permanent fund dividend, the applicant must have been an Alaska resident all through the qualifying year and at the date of application.¹ A resident who leaves the state remains an Alaska resident, so long as the person maintains the intent to return to Alaska to remain indefinitely and is not absent under circumstances inconsistent with Alaska residency.² A person who is not physically present in Alaska all through the qualifying year may be absent only for one of the specified allowable reasons listed in AS 43.23.008.³ Specified allowable absences include an absence when a person is receiving secondary education on a full-time basis, in addition to absences for any other reason consistent with Alaska residency for up to 120 days.⁴ Finally, persons who maintain their principal home in another state at any time from the beginning of the qualifying through the date of application are not eligible for dividends, even if they are Alaska residents.⁵

Ms. F. has remained an Alaska resident during the entire duration of her absence. It appears she has always intended to return to Big Lake to take over her father's company. She was absent to attend school, a reason not inconsistent with Alaska residency. For the last two months of 2005 and most of 2006, she was absent to accompany her husband. Her husband's assignment to Oklahoma was temporary, apparently of no longer duration than one year. Regardless of whether the absence to Oklahoma was allowable, it did not affect Ms. F.'s status as an Alaska resident who has constantly maintained the intent to return to Alaska to remain indefinitely and to make her home.

The division's principal argument is that, although she was enrolled full-time, Ms. F. was technically a part-time student because some of her classes were online classes. The applicable laws, AS 43.23.008(a)(1) and 15 AAC 23.163(c)(1), predate the advent of internet-based distance learning. According to the relevant portion of the latter regulation, "receiving secondary education or postsecondary education on a full-time basis means...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...."

The division's argument appears to be based on a common sense conclusion that if the student does not need to be physically present in the state where the class is being offered, online attendance should not be regarded as an allowable absence. One can imagine situations, for

¹ AS 43.23.005(a)(2)-(3).

² AS 43.23.095(7); AS 01.10.055(c).

³ AS 43.23.005(a)(6).

⁴ AS 43.23.008(a)(1), (14)(B).

example, in which an Alaskan student is Arizona claiming an allowable absence for taking online classes from a college on the East Coast. Theoretically a person could be absent from Alaska for the entire year while taking online classes from the University of Alaska and still claim an allowable absence. These kinds of hypothetical situations do raise questions about the intent of the law. At the same time, it does not seem particularly offensive that a student in Ms. F.'s case, who is actually in another state going to college there full-time, might have opted to take a few of her classes through an online program in order to accommodate her schedule. There is no suggestion that Ms. F. was really in Hawaii for other reasons than to go to school full-time.

While the division raises legitimate policy questions in response to evolving technology and education practices, the proper way to address such questions is through considered rulemaking, not through *ad hoc* denials of dividends or by straining the meaning of existing laws. The relevant law in this case says Ms. F. is eligible if she can show "enrollment and attendance in good standing." The division argues that Ms. F. was not "in attendance" in any of the online classes. While the words "attend" and "attendance" could have several meanings, some of which at least imply physical presence, the most commonly understood sense of the word seems to lie in its first definition, "to pay attention to."⁶ So long as Ms. F. was participating in a class in such a way as to maintain good standing with the college, it is difficult to say she was not "in attendance." The commonly understood meaning of the word appears not to preclude a professor from "taking attendance" of students physically in a classroom, students in a teleconference, students in a videoconference, students in an internet virtual chatroom, or students attending class by any other means, so long as the students are paying attention and able to participate in whatever manner the instructor deems necessary. If the intent of the law is to exclude students who attend class by electronic means, the law must clearly state that intent. At this point, the law does not specify the manner in which students must attend class, only that they must do so. Ms. F. did, on a full-time basis, attend class; her absence was therefore allowable.

The division argues that the time Ms. F. was in Oklahoma accompanying her husband was not allowable because her husband, although in the military, is not yet an Alaska resident. During 2005, Ms. F. was in Oklahoma with her husband for about two months, less than 120 days in addition to the time she was receiving postsecondary education on a full-time basis in Hawaii. For a 2007 dividend, which will be based on the 2006 qualifying year, the division's argument may very

⁵ 15 AAC 23.143(d)(1).

⁶ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 79, (11th ed. 2004).
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well apply. For a 2006 dividend, based on the 2005 qualifying year, it does not matter why Ms. F. was in Oklahoma or what she was doing there, so long as the reasons were consistent with continuing Alaska residency. Because Ms. F. was only in Oklahoma on a temporary basis to accompany her husband, her presence there was not inconstant with her intent to return to Alaska to remain indefinitely and make her home.

Finally, the division argues that Ms. F. maintained her principal home in Oklahoma after leaving Hawaii. Because she was only in Oklahoma for a limited time, and maintained the intent to return to her home in Big Lake where her family and future career was located, it is not proper to regard Oklahoma as Ms. F.'s principal home. While she might not have had a specific residence in Big Lake other than her parents' house, under the circumstances of this case it is most appropriate to regard Ms. F.'s principal home as Big Lake for the duration of her absence.

This case only concerns Ms. F.'s 2006 dividend, based on the 2005 qualifying year. Although she remained a resident at all times, it is possible that Ms. F.'s absence in 2006 was not allowable, and she might not qualify for a 2007 dividend. That issue, however, is not presently before the administrative law judge.

IV. Conclusion

Ms. F.'s absences during 2005 were allowable. Though absent, her principal home was in Alaska, and she has remained an Alaska resident at all times. Ms. F. is eligible for a 2006 dividend.

V. Order

IT IS HEREBY ORDERED that the decision of the application of B. F. for a 2006 permanent fund dividend be GRANTED.

DATED this 23rd day of April, 2007.

By: Signed
DALE WHITNEY
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 of the date of this decision.

DATED this 23rd day of May, 2007.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication.]