

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

In the Matter of	)	
	)	
M. K. D.	)	OAH No. 07-0373-PFD
	)	Agency No. 04234635_8
2004, 2005, & 2006	)	
<u>Permanent Fund Dividends</u>	)	

**DECISION AND ORDER**

**I. Introduction**

M. K. D. timely applied for the 2004, 2005, and 2006 Permanent Fund dividends (PFDs). At all relevant times, Ms. D. was a full-time non-resident student at the University of Oregon. On each year’s PFD application she responded “no” when asked if she was “gone from Alaska” for 90 days or more or 180 days or more; she responded “yes” when asked if she “was in Alaska today.” The Permanent Fund Dividend Division (“division”) granted Ms. D.’s 2004 and 2005 PFD applications. However, when it discovered an inconsistency on her 2006 PFD application, the division revisited Ms. D.’s 2004 and 2005 PFD applications, also. The division concluded that Ms. D. had intentionally provided deceptive information by failing to disclose reportable absences, and, as a matter of law, it had no choice but to deny her 2006 PFD application and to seek repayment of the 2004 and 2005 PFDs.

Ms. D. requested a hearing and appeared in person on September 17, 2007; the division was represented by PFD Specialist, Thomas Coté, who appeared telephonically. Kay L. Howard, Administrative Law Judge, presided.

Based on the evidence as a whole and after due deliberation, the decision of the division is reversed. It is more likely than not that Ms. D. misunderstood the questions asked on her PFD applications and answered the questions she mistakenly believed were being asked of her. The record does not support a finding that Ms. D. “intentionally provided deceptive information” in her PFD applications.

**II. Facts**

Ms. D. was born in Anchorage. She graduated from high school in the spring of 2003. She worked for the Alaska Railroad (ARR) from May 2003, through mid-September 2003, when

she left to attend the University of Oregon as a non-resident full-time student.<sup>1</sup> She remained at school until the winter break in December 2003, coming home once in November. She returned to school in January 2004, and completed her freshman year. In June 2004, as evidenced by Alaska Railroad payroll advance forms, she came home and worked at the ARR until January 2005, when Ms. D. returned to school to complete her sophomore year.<sup>2</sup> An enrollment verification form provided to the division by the National Student Clearinghouse shows her as being enrolled full-time during the period from September 27, 2004 through December 10, 2004, but Ms. D.'s employment records clearly establish this record is incorrect.<sup>3</sup>

Ms. D.'s sophomore year included study abroad in Japan. She was in Japan from spring 2005 until December 2005. Japan's school year does not follow the U.S. school calendar; in Japan, students attend school during the summer months. After her winter break, Ms. D. returned to the University of Oregon in January 2006, where she completed the school year. At the end of the school year, in June 2006, Ms. D. came home to Alaska and worked at the ARR until she returned to school for the Fall 2006 semester.<sup>4</sup>

Ms. D. completed her own PFD applications for the years in question. In 2004, Ms. D. submitted a paper application on January 31, 2004.<sup>5</sup> The application asked if she was "in Alaska today?" to which she answered "yes." The application also inquired whether, during 2003, she had been out of state for a total of 90 days or more or 180 days or more. She answered in the negative to both questions. Ms. D. filed applications for the 2005 and 2006 PFDs online. In 2005, she filed on January 16, 2005, from Anchorage, Alaska.<sup>6</sup> In 2006, she filed online on January 20, 2006, using an Internet service provider (ISP) in Eugene Oregon.<sup>7</sup> The online 2005 and 2006 PFD applications asked the same questions regarding presence in Alaska and number of days absent from the state. She answered these questions the same as she had in 2003: "yes" she was in Alaska and "no" she was not absent more than 90 or 180 days during the years in question.

The division's auditing program flagged Ms. D.'s 2006 PFD application because she had answered "yes" to the question whether she was in Alaska when the application had been filed

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<sup>1</sup> Exhibit A; D. Testimony.

<sup>2</sup> Exhibit B; D. Testimony.

<sup>3</sup> See e.g., Exhibit 4, p. 6.

<sup>4</sup> Exhibit C; D. Testimony.

<sup>5</sup> Exhibit 1, p. 1.

<sup>6</sup> Exhibit 1, p. 2.

<sup>7</sup> Exhibit 1, p. 3.

via an Internet service provider (ISP) located in Eugene, Oregon. Upon further investigation the division found that Ms. D. had been enrolled and attending the fall, winter, and spring quarters since the fall of 2003 at the University of Oregon. Based on this new information, the division subsequently denied and assessed Ms. D.'s 2004 and 2005 PFDs and denied her 2006 PFD.<sup>8</sup>

The division concluded, based on the evidence before it, that Ms. D. was absent from the state of Alaska on the date her 2004 and 2006 applications were signed and, as to all three applications, that she had been absent from Alaska for more than 90 or 180 days. The division reasoned that these actions rendered Ms. D. ineligible to receive a PFD for the years in question because by failing to disclose reportable absences on her PFD applications, she "intentionally provided deceptive information to the Division."<sup>9</sup> The division did not dispute that Ms. D.'s absences, had they been reported, would have been allowable.

Ms. D. argues that the division's calculations regarding 2003, the qualifying year for the 2004 PFD, are incorrect in that she did not leave the state until she started school in late September 2003, and returned for a period of time in November and December of that year. Therefore, she was not absent more than 90 days in 2003. Ms. D. argues in the alternative that had she been absent more than 90 days, the absence was to attend university as a full-time student paying non-resident tuition and thus, it was an allowable absence under the PFD rules.

Similarly, Ms. D. claims her absences in 2004 and 2005 (the qualifying years for the 2005 and 2006 PFDs) were to attend university as a full-time student paying non-resident tuition and thus, they were allowable absences under the PFD program. Finally, Ms. D. argues that she misunderstood the application questions and that any incorrect answer was due to a mistake on her part, not an attempt to provide intentionally deceptive information. Ms. D. asserts she thought the application asked about unallowable absences and because she was at school and allowably absent, she answered "no" to the questions whether she was gone from Alaska more than 90 or 180 days. As to the question "are you in Alaska today?", Ms. D. argues she was mistaken about the question and marked the wrong box, but she did not have an intent to deceive the division and receive a PFD to which she was not entitled.

### **III. Discussion**

In this case, the parties do not disagree about most of the facts, only about Ms. D.'s state of mind and its legal implications. In order to qualify for a permanent fund dividend, the

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<sup>8</sup> Exhibit 3.

<sup>9</sup> See e.g., Exhibit 3, p.1.

applicant either must have been physically present in Alaska all through the qualifying year, or have been absent from the state for one of the specific reasons listed in AS 43.23.008, the allowable absence statute.<sup>10</sup> AS 43.23.008 lists several different reasons a person may be absent from Alaska and still qualify for a dividend the next year. As in Ms. D.’s case, a person claiming an educational allowance under AS 43.23.008(a)(1), may be absent 120 days in addition to the educational absence.<sup>11</sup> The division does not contest that Ms. D.’s absences were to receive postsecondary education on a full-time basis, and that if she had reported them, her absences would have been allowable. Rather, the issue is whether Ms. D. “intentionally provided deceptive information” in her PFD applications.

The questions asked on a PFD application are designed to aid the division in carrying out its mission to ensure “that all eligible Alaskans receive timely dividend; fraud is prosecuted...”<sup>12</sup> As reflected in its regulations, the division relies on the application process and the truthfulness of the applicants to achieve its mission. This is why the division places such value on the questions “are you in Alaska today?” and whether the applicant was absent for 90 days or more.

Under 15 AAC 23.103(j), “the department will deny an application if the department determines that an individual has intentionally provided deceptive information such as failing to disclose a reportable absence to the department.” On the basis of this regulation, the division concluded that as a matter of law it had no choice but to deny Ms. D.’s applications.<sup>13</sup>

The division reasons that by asking “are you in Alaska today?” on the PFD application or “were you gone from Alaska for a total of 90 days or more?” it is requesting the applicant to disclose an absence. By regulation, “[a]ny absence since January 1 of the qualifying year must be disclosed upon request of the department.”<sup>14</sup> The division’s position is that asking these questions on a PFD application is a request to disclose an absence and by failing to answer “no” when asked if she was in Alaska at the time she completed her application or by answering “no” she had not been gone more than 90 or 180 days, Ms. D. failed to disclose a reportable absence on her application as required by regulation. Therefore it had to deny Ms. D.’s applications.

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<sup>10</sup> AS 43.23.005(a)(6).

<sup>11</sup> AS 43.23.008(a)(14)(B).

<sup>12</sup> <http://www.pfd.state.ak.us/>

<sup>13</sup> See generally Division Position Statement.

<sup>14</sup> 15 AAC 23.103(e).

It should be noted, however, that merely answering a question on the PFD application incorrectly does not automatically result in the denial of a PFD application. If it did, then every time an audit revealed someone had marked “no,” to the question whether they were in the state when, in fact, they actually were in the state, the division would be forced to deny that application as well. This is not the result the regulation was designed to achieve. The word “intentionally” means:

to do something purposely, and not accidentally or involuntarily. A person acts ‘intentionally’ if she desires to cause consequences of his act or she believes consequences are substantially certain to result.<sup>[15]</sup>

The regulation therefore requires that before denying an otherwise eligible applicant’s application, the division must consider the nature of the misstatement and its intended result.

It is incumbent upon the division to consider whether Ms. D. lied on her application, that is, intentionally provided deceptive information or whether she simply misunderstood the question, was mistaken, or was careless when answering. It does not appear that the division considered Ms. D.’s intent when they informed her that to obtain a dividend she:

must provide information to show that you were not absent from Alaska on the date your 2005 PFD application was signed; that you were not absent from Alaska for more than 90 or 180 days during 2004; that your absences from Alaska were allowable and that you are otherwise eligible to receive the 2005 PFD.<sup>[16]</sup>

There are several other ways Ms. D. could overcome the division’s initial conclusion that her application should be denied for intentionally providing deceptive information.<sup>17</sup> Ms. D. could convince the division that it was more likely than not that she correctly answered the question she understood was being asked. If she did, then she would not intentionally be providing deceptive information. Similarly, Ms. D. could convince the division that it was more likely than not that she was simply careless or mistaken when she filled out her dividend application, that she did not intend to deceive the division.

On the facts presented Ms. D. has established that it is more likely than not that she did not intentionally provide deceptive information to the division when she answered “yes,” she

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<sup>15</sup> BLACK’S LAW DICTIONARY p. 560 (Abridged 6<sup>th</sup> ed. 1991).

<sup>16</sup> Exhibit 3, p. 5. The denial letters for the 2004 and 2006 PFDs are substantially the same.

<sup>17</sup> At a formal hearing, the person who has requested the hearing has the burden of proving that the action to which he or she objects is incorrect. 15 AAC 05.030(h).

was in Alaska when she completed her application and “no” she had not been absent for more than 90 or 180 days.

Ms. D.’s testimony was credible. She testified that regarding the “are you in Alaska today” question, she was simply careless and made a mistake. She also testified that she misunderstood the questions asked regarding absences. Ms. D. testified convincingly that had she understood the questions, she would have answered “no” she was not in Alaska and “yes” she was absent more than 90 or 180 days and she would have completed the supplemental schedule. There was nothing to gain by intentionally providing deceptive information because Ms. D. knew that attending school was an allowable absence. She answered the question the way she did because she mistakenly believed the application was asking about unallowable absences. When asked by the division to complete the supplemental schedule, she did, and she provided all the necessary information.

#### **IV. Conclusion**

On the facts presented it is more likely than not that M. K. D. did not intend to provide deceptive information on her PFD applications. It is more likely than not that Ms. D.’s error in answering the questions at issue was the result of a mistake or carelessness, not intentional deception. Since the alleged deceptions were the division’s sole basis for denying her dividends, she is eligible for the 2004, 2005 and 2006 PFDs and the division’s denial of Ms. D.’s applications should be reversed.

#### **V. Order**

THEREFORE, IT IS ORDERED that the application of M. K. D. for a 2006 permanent fund dividend be GRANTED. IT IS FURTHER ORDERED that M. K. D. is eligible for the 2004 and 2005 permanent fund dividends.

DATED this 31st day of December, 2007.

By: Signed \_\_\_\_\_  
Kay L. Howard  
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 AS 25.27.210 and Alaska Rule of Appellate Procedure 601(a)(2) within 30 days after the date of this decision.

DATED this 28<sup>th</sup> day of January, 2008.

By: Signed  
Signature  
Kay L. Howard  
Name  
Administrative Law Judge  
Title

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