

admitted to a master's degree program at Northern Illinois University, and he spent the summer in Spokane.⁹

In addition to enrolling as a graduate student, Mr. H obtained a position as a graduate teaching assistant for the fall 2006 semester at Northern Illinois University. He was required by his employment contract as teaching assistant to participate in training and other meetings on campus from August 21-27, 2006.¹⁰ The 2006 fall semester began on August 28, 2006. The 2006 fall semester ended on December 16, and Mr. H again visited his family in Alaska over the mid-term break, returning to Alaska on December 21. He left Alaska on January 11, 2007, and returned to graduate school for the 2007 spring semester.¹¹

III. Discussion

AS 43.23.005(a) establishes certain statutory requirements for eligibility for a permanent fund dividend. In addition to Alaska residency, required by AS 43.23.005(a)(2) and (3), AS 43.23.005(a)(6) requires that the individual was absent from the state during the qualifying year for no more than the period allowed by AS 43.23.008(a). The division does not dispute that Mr. H is an Alaska resident. However, the division asserts that Mr. H was absent for more than the time allowed by AS 43.23.008(a)(1) and (16)(B), which together provide that an individual may be absent for no more than 120 days in addition to time absent "receiving secondary or post-secondary education on a full-time basis."

15 AAC 23.163(c)(1) states that "receiving secondary education on a full-time basis means...(B) enrollment and attendance in good standing, for the purpose of obtaining an associate, baccalaureate, or graduate degree, as a full time student at a[n accredited] college, university, or junior or community college...". In Mr. H's case, it is undisputed that during 2006 Mr. H was absent while enrolled and attending classes as a full time student from January 18-May 12 and from August 28-December 16 (227 days)¹² and that he was in Alaska December 21-31 (11 days). The division contends that during the entire remainder of 2006, or 127 days,¹³ Mr.

⁹ Ex. 2, p.2.

¹⁰ Ex. 2, p. 2; Ex. 5, p. 4.

¹¹ Ex. 2, pp. 3, 5-6.

¹² January 1-17 = 17 days; May 13-August 27 = 106 days; December 17-20 = 4 days. The division's position statement credits Mr. H with only 225 days as a student, 114 at Gonzaga and 111 at Northern Illinois. Ex. 3, pp. 7-8. In fact, the total agreed-upon allowable student absence is 227 days (January 18-May 12 = 115 days; August 28-December 16 = 112 days). Both totals disregard Mr. H's brief return to Alaska during the spring 2006 mid-term.

¹³ The division's position statement, relying on its erroneous credit of 225 days, rather than 227, as a student, asserts that Mr. H was unallowably absent for 129 days. Ex. 3, pp. 7-8. Excluding the 225 days as a student, and 11

H was unallowably absent. Mr. H argues that the two days after the end of the 2006 spring semester in which he attended his baccalaureate service and commencement should be included as part of his allowable absence for student status, as should the seven days when he was participating in training for his graduate assistantship at Northern Illinois University, prior to the 2006 fall semester.

It is not necessary to determine whether Mr. H's absences on May 13-14 and August 21-27 should be included as allowable absence, however, because both the division and Mr. H have incorrectly characterized his absences on January 1-17 and December 17-31, 2006, as not allowable. Since 1996, the department has issued a number of final decisions in contested cases in which 15 AAC 23.163(c)(1) was interpreted as including inter-term absences during a single academic year as allowable absences.¹⁴ These prior adjudicative decisions should not lightly be disregarded. As the Alaska Supreme Court recently observed:

[W]hile we have not had occasion to address this exact issue, some courts have held that administrative agencies, while not strictly subject to the doctrine of stare decisis, nonetheless must act consistently with their prior adjudications or explain why they do not. If administrative agencies did not adhere to some loose form of precedent, their actions could easily appear arbitrary. In fact, cases disapproving administrative action for failing to follow agency precedent have found the agency action arbitrary.^[15]

In a subsequent case, court stated:

[A]gencies may overrule a prior decision if convinced it was wrongly decided. When overruling a prior decision, the agency must provide a reasoned analysis that explains why the change is being made. Moreover, it may not act in an arbitrary, unreasonable, or discriminatory fashion.^[16]

In this case, the division apparently overlooked the prior decisions referenced above, and thus it provided no explanation as to why the interpretation previously afforded to 15 AAC 23.163(c)(1) should not be adhered to. Established agency precedent will therefore be applied in this case.

Because Mr. H was a full-time student at Gonzaga University in both the 2005 fall semester and the 2006 spring semester of the 2005-2006 academic year, his absence from Alaska

days in Alaska ($227 + 11 = 238$), the division has actually alleged only 127 days absent while not a student ($365 - 238 = 127$).

¹⁴ See In Re C., OAH No. 06-0482-PFD (2006); In Re F., Caseload No. 030631 (2004); In Re O., Caseload No. 950068 (1996); In Re C., Caseload No. 950128 (1996).

¹⁵ Alaska Public Interest Group v. State, 167 P.3d 27, 42 (Alaska 2007) (footnotes omitted).

¹⁶ May v. State, Commercial Fisheries Entry Commission, 168 P.3d 873, 884 (Alaska 2007).

for 17 days in 2006 during the interim between those semesters (January 1-17, 2006) was an allowable absence within the meaning of 15 AAC 23.163(c)(1). Similarly, because he was a full-time student at Northern Illinois University in both the 2006 fall semester and the 2007 spring semester of the 2006-2007 academic year, his absence from Alaska for 4 days in 2006 during the interim between those semesters (December 17-20, 2006) was an allowable absence within the meaning of 15 AAC 23.163(c)(1). These two periods add a total of 21 days to Mr. H's allowable absence as a student, substantially more than necessary to reduce his unallowable absence to less than 120 days in addition to his student status.

IV. Conclusion

Mr. H was not unallowably absent for more than 120 days in addition to his absence while receiving post-secondary education on a full-time basis.

V. Order

1. The division's denial of D P. H's application for a 2007 Alaska Permanent Fund dividend is REVERSED.
2. D P. H shall be paid a 2007 dividend.

DATED July 8, 2008.

Signed _____
Andrew M. Hemenway
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 Corrected 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of July, 2008.

By: *Signed* _____
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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