

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

In the Matter of)	
)	
K. L. B.)	OAH No. 08-0669-PFD
)	Agency No. 2007-062-1908
<u>2007 Permanent Fund Dividend</u>)	

DECISION & ORDER

I. Introduction

K. L. B. made a timely on-line application from California for a 2007 permanent fund dividend (PFD), claiming secondary/postsecondary education as the basis for an extended absence from the state during the qualifying year. The Permanent Fund Dividend Division found her ineligible on the basis that the college she attended was not accredited or otherwise qualified to sustain an allowable absence on the basis of secondary/postsecondary education, and on the basis that she had severed her legal residency in Alaska. At the informal appeal level, the agency maintained the denial but did not expressly renew its finding of severed residency. Ms. B. requested a formal hearing, which was held by telephone before this office on January 30, 2009.

Ms. B. was given two weeks after the hearing to submit a letter from the Alaska Commission on Postsecondary Education (ACPE). Ms. B. took advantage of this opportunity, and a letter from ACPE has been included in the record at Exhibit 23. Ms. B. also submitted new Exhibits 11 through 22, 24, and 25;¹ although these late submissions were not invited, they have been included in the record as well and have been carefully reviewed.

The denial is upheld because Ms. B.'s extended absence does not qualify as an allowable absence under the statute listing allowable absences, as that statute has been interpreted by Department of Revenue regulations. The Department of Revenue is bound by its own regulations.

II. Facts

K. B. is a longtime Alaskan who has received a PFD in the past.² By stipulation entered on the record at the formal hearing, her status as a legal resident of Alaska (up to the time of her application for the 2007 dividend, March 31, 2007) is not contested in this case.

¹ Exhibit 22 came in two parts. As supplemented on February 12, 2009, it now consists of five pages.

² Exhibit 1, p. 1 (2006 Adult Web Application, showing residency beginning in 1999 and receipt of prior dividend).

Ms. B. was originally trained in nutrition and dietetics, receiving a degree in that discipline in 1992. From 1994 to 1999, she held a variety of jobs, including temporary administrative services positions with religious or religiously-oriented organizations such as Bibles for the World, Woodman Valley Chapel, and Focus on the Family. She moved to Alaska in 1999 and worked as a dietitian at N.H., as a substitute teacher, as a coach, and as a temporary supplier of administrative services to two nonprofit organizations (Windwalkers International Ministries and Habitat for Humanity) and one for-profit business.³

In October of 2005, when she was 36 years old, Ms. B. enrolled in the Bethel School of Ministry in Redding, California. She attended from October 11, 2005 through May 19, 2006 and from September 5, 2006, through May 18, 2007.⁴ She remained out-of-state for most of the intervening summer. In 2006, the primary year of interest in this case, she was absent from Alaska a total of 349 days.⁵

Ms. B. is at the Bethel School to be trained as an itinerant preacher.⁶ The school has characterized the nature of its educational program as “vocational-technical” or “professional development.”⁷ The parties to this appeal agree that the Bethel School is not accredited by the accreditation association for the region in which it is located.⁸ It does not appear to be a degree-granting institution, and it is not eligible for the federal educational programs listed in 15 AAC 23.163(c)(1)(C).⁹

Ms. B. would like to be an itinerant religious speaker and author, and she is attending the program to further that goal.¹⁰ Although she did not testify that she hoped to make this a full-time career, she does envision that she may receive fees for the work.¹¹ Ms. B. states that there is no comparable program reasonably available within Alaska, and the ACPE has undertaken to verify that contention (although it has not done so as yet).¹² Students at the Bethel School are not, however, eligible for loans from the Alaska Commission on Postsecondary Education.¹³

³ Testimony of K. B.; Ex. 20, p. 1. The work for Windwalkers occurred in 2001.

⁴ Exhibit 8, pp. 8, 10 (letters from Bethel School).

⁵ Exhibit 1, p. 4 (Current Eligibility Record—Absences); *see also* Exhibit 2, p. 2 (letter of K. B.).

⁶ Testimony of K. B..

⁷ Exhibit 8, pp. 7, 9 (Education Verification Forms).

⁸ *See* Exhibit 8, p. 11 (description of program by K. B.).

⁹ Exhibit 7, p. 2 (Division finding no. 6); Exhibit 8, p. 2 (admission of finding).

¹⁰ Testimony of K. B. (recording at 18:40).

¹¹ *Id.*

¹² Exhibit 23 (letter from Alaska Commission on Postsecondary Education).

¹³ *Id.*; Exhibit 7, p. 2 (Division finding no. 6); Exhibit 8, p. 2 (admission of finding).

III. Discussion

In this appeal, Ms. B. has the burden of proving that the denial of her PFD was incorrect.¹⁴ Specifically, she needs to prove that she qualifies for one of the allowable absences she is claiming.

The qualifying year for the 2007 dividend was 2006.¹⁵ In order to qualify for a Permanent Fund Dividend in 2007, the applicant had to have been physically present in Alaska all through the qualifying year, or only have been absent for one of the 16 allowable reasons listed in a statutory section entitled “Allowable Absences,” AS 43.23.008.¹⁶ There are three of the allowable absences that potentially apply to Ms. B.

One of the specifically allowable absences is an absence for any reason consistent with Alaska residency. Vacations and the like fit under this absence. However, an absence for this open-ended reason cannot have exceeded 180 days under any circumstances.¹⁷ Since Ms. B. was absent for 349 days, this allowable absence cannot, by itself, save her eligibility for the dividend. She would need to qualify for a second type of allowable absence as well.¹⁸

The second potentially applicable provision is the one Ms. B. claimed when she originally submitted her application: an absence “receiving secondary or postsecondary education on a full-time basis.”¹⁹ The Department of Revenue has adopted a regulation, 15 AAC 23.163(c)(1), defining the phrase “receiving secondary or postsecondary education on a full-time basis.” With respect to postsecondary education, that definition requires that the institution either be “accredited by the accreditation association for the region in which the college or university is located”²⁰ or eligible for certain federal programs such as Nellie Mae.²¹ Through the informal appeal process that preceded the present appeal, Ms. B. and the PFD Division came to agreement that the Bethel School does not meet either of these criteria.²²

The third potentially applicable provision is an absence “receiving vocational, professional, or other specific education on a full-time basis for which, as determined by the Alaska Commission on Postsecondary Education [ACPE], a comparable program is not reasonably available in the

¹⁴ 15 AAC 05.030(h).

¹⁵ AS 43.23.095(5).

¹⁶ AS 43.23.005(a)(6). The list of allowable absences has since been lengthened, but the alteration does not affect the 2007 dividend year. Ch. 36 SLA 2008.

¹⁷ AS 43.23.008(a)(16)(A) [2007 version].

¹⁸ The maximum length of the catchall absence is reduced somewhat if the applicant is claiming certain other kinds of absences in the same year. *See* AS 43.23.008(16) [2007 version].

¹⁹ AS 43.23.008(a)(1).

²⁰ 15 AAC 23.163(c)(1)(B).

²¹ 15 AAC 23.163(c)(1)(C).

state.”²³ This provision, which has likewise been further elucidated by regulation, is the centerpiece of Ms. B.’s current argument on appeal.

The regulation defining this category of absences is binding on the Department of Revenue.²⁴ It divides the category into two subclasses. One type of qualifying program is “vocational-technical training as part of a career education program,” but this type of training is only recognized if the ACPE grants loans to students in the program.²⁵ The ACPE does not grant loans to attend the Bethel School.²⁶

The second subclass permits absences to attend “an academic institution, seminar, or other recognized classroom course or classroom program for continuing professional educational development.”²⁷ It is arguable that Ms. B. is attending “an academic institution,” and that the program it offers meets the general statutory prerequisite that “a comparable program is not reasonably available in the state.”²⁸ There remains the question whether it is “for continuing professional educational development.”

Although Ms. B. had worked in an administrative capacity for religious organizations in the past, she had not been a preacher and it would not be fair to say that she had a “profession” in the discipline she is now in school to learn. As the Department of Revenue has consistently interpreted its regulations, one cannot embark on a program of “continuing” professional education before one’s profession has begun.²⁹

Ms. B. argues that she received a 2006 PFD on the basis of an application that characterized the Bethel School as a professional development program, and therefore “I shouldn’t have to prove

²² See notes 8, 9, and 13 above.

²³ AS 43.23.008(a)(2).

²⁴ Thus, even if alternative readings of AS 43.23.008(a)(3) might be plausible, the Department of Revenue must adhere to the reading it has adopted by regulation. As the Alaska Supreme Court held in *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1243 (Alaska 1992):

An agency is bound by the regulations it promulgates. See 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:21 at 98 (2d Ed.1979). An agency has not acted in the manner required by law if its actions are not in compliance with its own regulations.

²⁵ 15 AAC 23.163(c)(2)(A)(i).

²⁶ Ex. 23. Ms. B. has submitted some argument in Exhibit 11 that appears to suggest that she thinks the regulation’s reliance on ACPE loan eligibility is inappropriate. This kind of argument is beyond the jurisdiction of an administrative law judge or commissioner; it must be pursued in the court system. See *Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir. 1985).

²⁷ 15 AAC 23.163(c)(2)(B)(i). This second subclass also has a provision for health professionals, such as hospital residents, that is clearly inapplicable here. 15 AAC 23.163(c)(2)(B)(ii).

²⁸ AS 43.23.008(a)(2).

²⁹ See *In re S.L.P.*, OAH No. 07-0576-PFD (Comm’r of Revenue 2008).

it for the 2007 PFD.”³⁰ There are two defects in this argument. First, even if the PFD Division overlooks a defect in an application in one year, it is not barred from correcting that error in a later year.³¹ Second, since Ms. B. did not begin attending the school until October of 2005, she probably spent a short enough period out of the state during the qualifying year for the 2006 dividend that she remained eligible for that dividend.

Because she spent 349 days outside Alaska in the qualifying year for the 2007 dividend, and has not carried her burden of showing that her absence was allowable, there is not a legal way to grant Ms. B. a 2007 dividend.

IV. Conclusion

Because of her extended absence, Ms. B. is not eligible for the 2007 PFD. She apparently remained an Alaska resident at least until the date of application for the 2007 dividend,³² and nothing in this decision precludes her from eligibility for future PFDs upon return to Alaska.

The decision of the Permanent Fund Dividend Division to deny the application of K. L. B. for a 2007 permanent fund dividend is AFFIRMED.

DATED this 20th day of February, 2009.

By: Signed _____
Christopher Kennedy
Administrative Law Judge

³⁰ Ex. 11 at 5.

³¹ AS 43.23.035(b) reflects the legislature’s recognition that some errors might be discovered after the fact; it makes it clear that the agency is not bound by those errors.

³² This decision should not be interpreted as a final determination that Ms. B. remained an Alaska resident at any time, but the evidence is consistent with residency having been maintained so long as she remained in California primarily for the purpose of attending the Bethel School full-time. There is some indication in the record that she may have ended her enrollment in the spring of 2007 and stayed on in California to work as a dietitian. *See, e.g.*, Ex. 20, p. 3 (indicating completion of only the second year at Bethel School). Such a progression, if it occurred, might well be inconsistent with continued Alaska residency.

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 after the date of this decision.

DATED this 31st day of March, 2009.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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