

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

In the Matter of)	
)	
C. L. M.)	OAH No. 09-0275-PFD
)	Agency No. 2008-029-6276
<u>2008 Permanent Fund Dividend</u>)	

DECISION & ORDER

I. Introduction

C. L. M. made a timely on-line application from California for a 2008 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 him ineligible on the basis that the college he attended was not accredited or otherwise qualified to sustain an allowable absence on the basis of secondary/postsecondary education. At the informal appeal level, the agency maintained the denial on the original basis and also added a determination (which it has since withdrawn) that Mr. M. severed his Alaska residency when he traveled to another state for his education. Mr. M. requested a formal hearing, which was held before this office on July 6, 2009.

Mr. M. was given one month after the hearing to submit supplemental materials regarding the status of his educational program with the Alaska Commission on Postsecondary Education (ACPE). Mr. M. did not make a further submission.

The denial is upheld because Mr. M.'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

C. M. was born and raised in Alaska,¹ and at all times relevant to this decision he has remained legally an Alaska resident. By stipulation entered on the record at the formal hearing, his status as a legal resident of Alaska (up to the time of his application for the 2008 dividend, February 1, 2008) is not contested in this case.

Mr. M. graduated from Colony High School in 2004. He then took some college courses at a local college and worked construction.² In September of 2006, when he was 21 years old, Mr. M.

¹ Testimony of C. and K. M.

² Testimony of C. M.

enrolled in the Bethel School of Ministry in Redding, California. During 2007, he attended from January 6 through May 20 and from September 8 through December 20.³ He worked for his uncle in Alaska during the intervening summer.⁴ In 2007, he was absent from Alaska a total of 266 days.⁵ The sole purpose of the absence was to attend the Bethel School.⁶ Mr. M. continued at the Bethel School for three academic years;

At the Bethel School, Mr. M. studied the Bible, ministry, and how to reach out to people.⁷ He attended in order to “get my life straightened out,” and the experience worked well to give him focus.⁸ At the conclusion of his studies at Bethel, he has returned to Alaska and currently works here as an equipment operator for an environmental firm.⁹ His career plan is to obtain a business degree and then to operate a golf course business.¹⁰

The school has characterized the nature of its educational program as “vocational-technical.”¹¹ Education at the Bethel School can lead to the ministry, but can also be aimed at nonprofessional roles in the work of a church.¹² 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.¹³ 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) or for loans from the Alaska Commission on Postsecondary Education (ACPE).¹⁴ Mr. M. has offered evidence that there is no comparable program reasonably available within Alaska,¹⁵ although the ACPE does not appear to have rendered an opinion on whether this is so.

³ Exhibit 2, p. 1 (Education Verification Form).

⁴ Testimony of C. M.

⁵ Exhibit 1, p. 3 (Current Eligibility Record—Absences). The number of days of absence slightly exceeds the number of days of actual enrollment.

⁶ Testimony of C. M.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Exhibit 2, p. 1 (Education Verification Form).

¹² Testimony of K. M.

¹³ *See, e.g.*, Exhibit 6, p. 3 (memo from C. M. re “Other Considerations”).

¹⁴ Exhibit 4, p. 1 (communication from Alaska Commission on Postsecondary Education). This finding is also based on Mr. M.’s failure to make any submission in response to paragraph 1 of the Order on Further Proceedings dated July 7, 2009.

¹⁵ Testimony of K. M.

III. Discussion

In this appeal, Mr. M. has the burden of proving that the denial of his PFD was incorrect.¹⁶ Specifically, he needs to prove that he qualifies for one of the allowable absences he is claiming.

The qualifying year for the 2008 dividend was 2007.¹⁷ In order to qualify for a Permanent Fund Dividend in 2008, the applicant had to have been physically present in Alaska all through the qualifying year, or only have been absent for one of the 17 allowable reasons listed in a statutory section entitled “Allowable Absences,” AS 43.23.008.¹⁸ There are three of the allowable absences that potentially apply to Mr. M.

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.¹⁹ Since Mr. M. was absent for 266 days, this allowable absence cannot, by itself, save his eligibility for the dividend. He would need to qualify for a second type of allowable absence as well.

The second potentially applicable provision is the one Mr. M. claimed when he originally submitted his application: an absence “receiving secondary or postsecondary education on a full-time basis.”²⁰ 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”²¹ or eligible for certain federal programs such as Nellie Mae.²² The Bethel School does not meet either of these criteria.

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

¹⁶ 15 AAC 05.030(h).

¹⁷ AS 43.23.095(5).

¹⁸ AS 43.23.005(a)(6).

¹⁹ AS 43.23.008(a)(17)(A). 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(17).

²⁰ AS 43.23.008(a)(1).

²¹ 15 AAC 23.163(c)(1)(B).

²² 15 AAC 23.163(c)(1)(C).

state.”²³ This provision, which has likewise been further elucidated by regulation, is the centerpiece of Mr. M.’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 Mr. M. is attending “an academic institution,” and that the program it offers may meet 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.” Prior to attending Bethel School, Mr. M. worked construction. He did not have a “profession” in the discipline he went to Bethel 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

Because he spent 266 days outside Alaska in the qualifying year for the 2008 dividend, and has not carried his burden of showing that his absence was allowable, there is not a legal way to grant Mr. M. a 2008 dividend.

IV. Conclusion

Because of his extended absence, Mr. M. is not eligible for the 2008 PFD. He remained an Alaska resident at least until the date of application for the 2008 dividend, and nothing in this

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. 4, p. 1.

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); *In re K.L.B.*, OAH No. 08-0669-PFD (Comm’r of Revenue 2009).

decision precludes him from eligibility for future PFDs in years in which he is not disqualified by an extended absence.

The decision of the Permanent Fund Dividend Division to deny the application of C. L. M. for a 2008 permanent fund dividend is AFFIRMED.

DATED this 28th day of August, 2009.

By: Signed
Christopher Kennedy
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 after the date of this decision.

DATED this 25th day of September, 2009.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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