

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

In the Matter of)	
)	
P. D.)	
)	
<u>2010 Permanent Fund Dividend</u>)	OAH No. 10-0323-PFD Agency No. 2010-030-9601

DECISION

I. Introduction

P. D. timely applied for a 2010 Permanent Fund Dividend (“PFD”). The Permanent Fund Dividend Division (“Division”) determined that he was not allowably absent from Alaska during 2009, the qualifying year for the 2010 PFD, and therefore is ineligible for a 2010 PFD. Following an unsuccessful informal appeal, Mr. D. requested a formal hearing by correspondence.

By notice dated July 7, 2010, Mr. D. was given until August 7, 2010, to send any additional documents or correspondence for consideration in this formal appeal. The division was given the same deadline. Both parties then had until August 17, 2010, to respond to any documents received from the other. The division filed a position statement and hearing exhibits. Mr. D. did not respond to the division’s position statement or add to the record on appeal. The division’s denial of Mr. D.’s application is affirmed because he failed to establish by a preponderance of the evidence that all of his 2009 absences were allowable.

II. Facts

There is very little factual dispute between the parties. Mr. D. is a lifelong Alaska resident who has received a PFD every year since birth until the denial of his 2010 application.

In 2009, Mr. D. was absent from Alaska a total of 201 days. He was absent from Alaska from January 15, 2009 – April 12, 2009 and from August 29, 2009 through December 1, 2009. He identified the former as an absence for school to attend the Academy For Individualized Study in Las Vegas, Nevada, and play hockey.¹ The latter as an absence to only play hockey.²

When the division has an individual claiming an allowable absence for school it asks the institution to complete the division’s Education Verification Form. The Academy for Individualized Study completed the form and identified January 21, 2009 – April 1, 2009 as Mr.

¹ Exh 2. at 4.
² Exh. 1 at 3.

D.'s dates of enrollment and attendance. Using this information, the division concluded that Mr. D. was "absent from Alaska for more than 120 days in addition to full-time schooling."³ The division allocated Mr. D.'s absences as follows:

Date ⁴ s	In Alaska	Absent	Allowable School	Absent Hockey
1/1 – 1/15	15			
1/16 – 1/20		5		
1/21 – 4/1			71	
4/2 - 4/12		11		
4/13 – 8/29	139			
8/30- 12/21				114
Total	154	16	71	114

In response to the division's denial, Mr. D. provided a written explanation. He noted before he left for school his mother contacted the PFD office and was told by a "male employee" that "besides the absence for school, you may be gone an additional 120 days."⁵ However, Mr. D. did not identify the person with whom she spoke. Mr. D. felt that his mother had been misinformed by the division that the days spent out of state before and after a term were not allowable. He was aware of the limit on absences and he would have made sure his total nonschool absences did not exceed 120 days.⁶

III. Discussion

Mr. D. raises two arguments in support of his appeal. The first is that the five days before school started and 11 days after the term ended should be allowable regardless of whether the absences were verified by the school. Mr. D. reasons he was required to leave Alaska a few days before school started to find a school and register. He remained after the term ended to ensure he passed his classes and received the credits necessary to return to Alaska to graduate.⁷ Therefore he believes these absences are for the purpose of receiving an education and thus allowable.

³ Exh. 2 at 2.

⁴ Division Position Statement at 4.

⁵ Exh. 8 at 2.

⁶ *Id.*; Exh. 3..

⁷ *Id.*

In the alternative, Mr. D. argues that he reasonably relied to his detriment on the representations of a division employee. Therefore, the division should be estopped from denying his 2010 PFD application.

The division responds that Mr. D. was absent 130 days in addition to the 71 days for school. Therefore, the 121st day through the 130th days were not allowable absences and he is ineligible for a 2010 PFD as a matter of law. It also argues that a general statement by Mr. D. that he or his mother were misinformed by a division employee does “not relieve him of the responsibility of complying with eligibility guidelines – including those related to absences for school attendance.”⁸

A PFD applicant must meet several eligibility requirements.⁹ One of the eligibility requirements is that a person must have been physically present in Alaska throughout the qualifying year, or only absent as allowed by AS 43.23.008.¹⁰

Mr. D. claims he was allowably absent under AS 4.23.008(a)(1) and (a)(17)(B). Subsection (a)(1) provides that an otherwise eligible individual who is absent from Alaska during the qualifying year remains eligible (is allowably absent) if the individual is “receiving secondary or postsecondary education on a full-time basis.”¹¹ Subsection (a)(17)(B) provides that otherwise eligible individual may be absent from Alaska “for any reason consistent with the individual’s intent to remain a state resident,” provided the cumulative absences “do not exceed 120 days” when the individual is also claiming he was allowably absent for school¹² Mr. D. does not dispute that he was absent from Alaska for 201 days. The dispute focuses on whether the 16 days before and after the school term fit within subsection (a)(1), an absence to receive education on a full-time basis.

A statute must be read in conjunction with the regulations that implement it. The regulation that defines the phrase “receiving secondary or postsecondary education on a full-time basis” requires that the applicant be enrolled and attending in good standing as a full-time student provided the individual “clearly demonstrates that the primary reason for the individual’s

⁸ Division Position Statement at 3.

⁹ AS 43.23.005.

¹⁰ AS 43.23.005(a)(6).

¹¹ AS 43.23.008(a)(1).

¹² AS 43.23.008(a)(17)(B).

absence is to obtain a secondary education . . . ”¹³ Mr. D.’s unsworn written statement that his absences were school related without corroborating support from the school does not “clearly demonstrate” that the primary reason was to obtain a secondary education. Moreover, even if a reasonable period of time before school commences and after it concludes is allowable, Mr. D.’s 16 days appear excessive on the evidence provided. Therefore, Mr. D. may not claim these absences as allowable under AS 43.23.008(a)(1) because he has failed to present persuasive evidence that his physical presence was required by the school.

While Mr. D. is not eligible as a matter of law, he has asserted as an alternative theory of eligibility, that as a matter of equity his application should be approved. While not phrased as such, Mr. D. has claimed that the division is estopped from denying his application because he acted in reliance (planned the number of days absent from Alaska) on a statement made by a division employee, and that as a result of that reliance, his application has been denied.

The Supreme Court has stated that

estoppel may apply against the government and in favor of a private party if four elements are present: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.¹⁴

The first element of equitable estoppel is the most difficult to prove in this case. Mr. D. asserts that his mother contacted the division on two different occasions to ask about allowable absences and each time “a male employee told her ‘beside your absence for school, you may be gone from the state for 120 additional days.’”¹⁵ Mr. D.’s unsworn statement that his mother told him that a division employee told her the absence would be allowable is double hearsay and too tenuous upon which to make a finding of fact.¹⁶ Moreover, the statement on its face is correct: in addition to an AS 43.23.008(a)(1) absence for secondary education, a resident may be allowably absent up to 120 days. The issue presented in Mr. D.’s appeal is whether the days in

¹³ 15 AAC 23.163(c)(1)(A); 15 AAC 23.163(d). It does not appear that the school attended, the Academy for Individualized Study, is more than a home school charter program. If Mr. D. was playing hockey while in Nevada, it could call into question whether his primary purpose for his absence was to obtain an education or to play hockey.

¹⁴ *Crum v. Stalnaker*, 936 P.2d 1254, 1257 (Alaska 1997). *In re C.G.* OAH No. 09-0436-PFD (January 2010) (Applying the principal of equitable estoppels to a PFD appeal).

¹⁵ Exh. 8 at 2.

¹⁶ A hearing is not conducted according to technical rules of evidence. Relevant evidence must be admitted if it is probative of material facts. Irrelevant and unduly repetitious evidence must be excluded. Hearsay evidence is admissible if in the judgment of the hearing officer it is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

excess of 120 were for the primary purpose of receiving a secondary education, and he has not met his burden of proving that they were. However, one looks at the case, some portion of Mr. D.'s absence in 2009 is not allowable as a matter of law.

IV. Conclusion

In 2009, the qualifying year for the 2010 PFD, Mr. D. was absent from Alaska a total of 130 days in addition to 71 days for school. Therefore, he is not eligible for a 2010 PFD. This decision does not affect his status as a resident or his eligibility for 2011 and future dividends.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of P. D. for a 2010 permanent fund dividend is AFFIRMED.

DATED this 31st day of August, 2010.

By: Signed _____
Rebecca L. Pauli
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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27th day of September, 2010.

By: Signed Kay L. Howard for _____
Signature
Rebecca L. Pauli _____
Name
Administrative Law Judge _____
Title

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