

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

In the Matter of :)	
)	
R. K.)	
)	OAH No. 10-0541-PFD
<u>2010 Alaska Permanent Fund dividend</u>)	DOR Nos. 2010-002-3568

DECISION

I. Introduction

R. K. filed a timely application for a 2010 Alaska Permanent Fund dividend. Following an informal conference, the Permanent Fund Dividend Division denied the application on the ground that she had been absent from Alaska during the qualifying year for more than the allowable time.¹ Ms. K. filed a timely appeal and the case was referred to the Office of Administrative Hearings for a hearing.

The assigned administrative law judge conducted a telephonic hearing. Ms. K. participated and Pete Scott represented the division. Because Ms. K. was absent during the qualifying year for more than the time than allowed under AS 43.23.008(a)(17), the division's decision to deny her application is sustained.

II. Facts

R. K. is a life-long resident of Alaska. At the start of 2009 she was living in Fairbanks. Ms. K.'s father is a professor at the University of Alaska (Fairbanks) who was on sabbatical as an employee of the university during the spring term of 2009.² On January 12, 2009, Ms. K. left Alaska and travelled to Hawaii, where she stayed with her father on his sabbatical.³ Ms. K. left Hawaii and returned to Alaska on April 24, to attend her high school prom in Fairbanks.⁴ She left Alaska and returned to Hawaii on April 27,⁵ and came back to Alaska on May 15 to attend her high school graduation.⁶ On May 21, Ms. K. left Alaska and travelled to Germany on vacation, returning to Alaska on June 18.⁷

¹ Ex. 7, p. 1.

² Ex. 5, p. 3; Ex. 8, p. 7.

³ Ex. 8, pp. 7-9.

⁴ Ex. 8, p. 7. Ms. K.'s father asserts that she returned on April 24. Ex. 8, p. 17. Since her absence in Hawaii is allowed, whether the correct date is April 23 or April 24 makes no difference.

⁵ Ex. 8, p. 10.

⁶ Ex. 8, p. 7.

⁷ Ex. 8, p. 7, 11.

In February, Ms. K. was awarded a \$12,500 college scholarship by the American Civil Liberties Union (ACLU).⁸ As part of the scholarship program, the ACLU invited Ms. K. to attend the 2009 Youth Activist Institute in New York City, at ACLU's expense, scheduled for June 22-27.⁹ Ms. K. accepted the invitation. She left Alaska on June 20 and participated in the program at the ACLU's national office, returning to Alaska on July 2.¹⁰

Ms. K. spent the summer, from July 3-September 10, in Fairbanks.¹¹ On June 22, 2009, Ms. K. had been offered deferred admission into No Name University, to begin in the fall of 2010.¹² Because of the deferred admission date, Ms. K. was able to spend the fall of 2009 working on the staff of an unspecified Senator. Ms. K. left Alaska and travelled to Washington, D.C., on September 10.¹³ She was employed by the Senator in Washington from September 14 until December 18.¹⁴ Ms. K. planned on returning to Alaska on December 19, but due to snowstorms was unable to travel until later;¹⁵ she returned to Alaska on December 22 and remained in Fairbanks through the end of 2009.¹⁶

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 Ms. K. is an Alaska resident. However, the division argues that she was absent from Alaska during 2009 for more than the time allowed by AS 43.23.008(a). Specifically, the division argues that Ms. K. is ineligible pursuant to AS 43.23.008(a)(17)(C), which provides that an Alaska resident who is absent from Alaska for more than 45 days in addition to any absences claimed under AS 43.23.008(a)(1)-(16) is ineligible for the dividend.

⁸ Ex. 8, p. 22.

⁹ Ex. 8, p. 23.

¹⁰ Ex. 8, pp. 7, 14-15.

¹¹ Ex. 8, p. 7.

¹² Ex. 11, p. 2.

¹³ Ex. 1, p. 2; Testimony of R. K., L. K..

¹⁴ Ex. 8, pp. 25, 26.

¹⁵ Ex. 8, p. 16; Testimony of R. K..

¹⁶ Ex. 3, p. 1; Ex. 8, pp. 7, 25; Ex. 9, p. 3.

In this case, according to the division's calculations Ms. K. was absent from Alaska for 263 days in 2009.¹⁷ The division concedes that Ms. K. is entitled to claim allowances for absences of 120 days (January 13-April 24 and April 28-May 15) while in Hawaii with her father, pursuant to AS 43.23.008(a)(13), and of 96 days (September 14-December 18) while employed on the Senator's staff in Washington, D.C., pursuant to AS 43.23.008(a)(1).¹⁸ The combined total of these conceded allowances under AS 43.23.008(a) is 216 days. The division contends that Ms. K. was absent from Alaska for 47 days¹⁹ in addition to the conceded allowances (263 - 216 = 47), two more days than are allowed under AS 43.23.008(a)(17)(C).²⁰

Ms. K. argues that she is entitled to claim at least two additional days of allowable absence, either for her travel time to and from Washington, D.C., for her employment on the Senator's staff, or for her attendance at the ACLU program in New York City.²¹

A. The Division Properly Denied An Allowance For Travel Time

AS 43.23.008(a)(10) provides an allowance for an absence "if the individual was absent...serving on the staff of a member from this state of the United States Congress." As Ms. K. observes, travel to and from locations remote from Alaska takes time. She argues that AS 43.23.008(a)(10) should be construed to allow a reasonable time for travel in addition to the time spent as a paid staff member. Because Ms. K.'s return to Alaska was delayed by at least two days due to snowstorms, she argues that she should be provided an additional two days' allowance for travel time.²²

The division responds:

[T]he Division calculates all absences under AS 43.23.008(a) very precisely. By insuring all Alaskans are subject to the same exact standard when calculating absence dates the Division can maintain an objective and impartial process for uniformly applying the same absence guidelines to every application.^[23]

¹⁷ The division initially included September 11 as a day in Alaska, and calculated her absence as 262 days. Position Statement, p. 6. Testimony at the hearing established that Ms. K. actually left on September 10, not September 11. See note 13, *supra*. Accordingly, at the hearing the division asserted withdrew its concession as to that date, and recalculated her absence as 263 days.

¹⁸ Position Statement, p. 7; see note 17, *supra*.

¹⁹ The specific dates are May 22-June 18 (28 days), June 21-July 2 (12 days), September 11-13 (3 days), and December 19-22 (4 days).

²⁰ Position Statement, p. 7; see note 17, *supra*.

²¹ Ex. 9, p. 3.

²² Ms. K. travelled to Washington, D.C., several days in advance of beginning work in order to set up her lodgings. Ex. 9, p. 3. Her absence during that time was not due to the vagaries or necessities of travel.

²³ Position Statement, p. 4.

Whether AS 43.23.008(a) should be construed to provide a reasonable time for travel has been addressed by the commissioner previously. In Re M.L. rejected the argument that additional time should be allowed for travel, stating (with respect to the allowable absence for students provided by AS 43.23.008(a)(1)): “the law does not currently provide for travel time as an allowable absence.”²⁴ Whether this same construction should be placed on the other allowable absences listed in AS 43.23.008(a), and in particular on AS 43.23.008(a)(10), has not been addressed by the commissioner. Because a regulation, 15 AAC 23.163(c), expressly limits eligibility for the student allowance to time spent in attendance at an academic or vocational institution or a college or university, the commissioner’s specific ruling that travel time is not allowed for a student absence does not necessarily mean that the commissioner would make the same ruling with respect to other types of absences which are not expressly limited by language indicative of physical presence (“attendance”) at a particular location (“institution”).

At issue in this particular case is the nature of the allowable absence provided by AS 43.23.008(a)(10). It would be equally reasonable to construe the statutory language as providing a reasonable period of time for travel to and from the staff member’s work location as not providing any time at all for travel. However, it is a general rule of statutory construction that different subsections of a statute should be construed consistently,²⁵ and to construe AS 43.23.008(a)(10) as providing a reasonable time for travel would be inconsistent with the commissioner’s decision construing AS 43.23.008(a)(1) with respect to that same issue.²⁶ Absent a contrary interpretation of AS 43.23.008(a)(10) by the commissioner, the division correctly denied an allowance for Ms. K.’s travel to and from Washington, D.C., even though her return to Alaska was delayed by reasons beyond her control.²⁷

²⁴ In Re M.L. at 2, OAH No. 05-0818-PFD (Commissioner of Revenue 2006).

²⁵ This general rule is known by the Latin term, *in pari materia*. See, e.g., In Re D.W. at 5, OAH No. 06-0178-PER (Office of Administrative Hearings 2007).

²⁶ The administrative law judge has not found any published decision addressing the proper construction of AS 43.23.008(a) in this regard other than In Re M.L., cited in the text. However, published decisions suggest that the division has not been entirely consistent with respect to the treatment of travel time. See In Re M.R.P. at 2, OAH No. 09-0424-PFD (Commissioner of Revenue 2010) (applicant left Alaska on May 24 for medical treatment scheduled for June 5; division asserts absence from May 25-June 3 is not allowable); In Re P. and E. E. at 2, OAH No. 08-0668-PFD (Commissioner of Revenue 2009) (applicant released from treatment August 16 and returned to Alaska August 24; division counted absence from August 17-23 as allowable absence).

²⁷ Cf. In Re P. and E.E., at 3-4 (“[A] person who....suffers an unforeseen accident or illness requiring an absence of more than [the allowable period] later in the same year would not be eligible.”).

B. The Division Properly Denied An Allowance For The ACLU Program

Two subsections of AS 43.23.008(a) are potentially applicable to Ms. K.'s attendance at the ACLU program in New York City.²⁸ AS 43.23.008(a)(1) provides an allowance while "receiving secondary or postsecondary education on a full-time basis." AS 43.23.008(a)(2) provides an allowance while "receiving vocational, professional, or other specific education on a full-time basis for which, as determined by the Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state."

1. *AS 43.23.008(a)(1) Does Not Apply*

Under AS 43.23.008(a)(1), an absence may be allowed while "receiving secondary or postsecondary education on a full-time basis." This statute is implemented by a regulation, 15 AAC 23.163(c)(1), which states:

(c) For purposes of

(1) AS 43.23.008(a)(1), receiving secondary or postsecondary education on a full-time basis means enrollment and attendance in good standing as a full-time student where participation requires absence from this state...

(B) for the purpose of pursuing a vocational certificate, associate, baccalaureate, or graduate degree, as a full-time student at a college, university, junior or community college, or postsecondary vocational institution..., or full-time participation in an internship program if the internship is required by the college or university as part of the student's academic program...; or

(C) for the purpose of pursuing a vocational certificate, associate, baccalaureate, or graduate degree, as a full-time student

(i) at a Title IV institution...; or

(ii) at a non-accredited college or university...

Under this regulation, an individual must be pursuing a vocational certificate or a degree program in order to claim the allowance. Ms. K.'s attendance at the ACLU seminar was not in pursuit of a vocational certificate or a degree. Ms. K. argues that the allowance should be provided because the program was associated with the award of a college scholarship, but under the regulation the program must itself be in pursuit of the certificate or degree. The division properly denied an allowance under AS 43.23.008(a)(1).

2. *AS 43.23.008(a)(2) Does Not Apply*

Under AS 43.23.008(a)(2), an absence may be allowed while "receiving vocational, professional, or other specific education on a full-time basis for which, as determined by the

²⁸ A third subsection, AS 43.23.008(a)(16), applies to absences "for educational purposes in a student fellowship sponsored by the United States Department of Education or by the United States Department of State." The ACLU program was sponsored by the ACLU, not by the Department of Education or the Department of State.

Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state.”

Prior to January 1, 2010, 15 AAC 23.163(c)(2) provided that in AS 43.23.008(a)(2):
receiving vocational, professional, or other specific education on a full-time basis means
(A) enrollment and attendance in good standing as a full-time student receiving vocational-technical training as part of a career education program...;
(B) continuing professional educational development...^[29]

While attending the ACLU program in New York, Ms. K. was not receiving vocational-technical training as part of a career education program, nor was she obtaining continuing professional education. Thus, she is ineligible under the version of 15 AAC 123.163(c)(2) in effect throughout the qualifying year, 2009.

Effective January 1, 2010, this regulation was amended. 15 AAC 23.163(c)(2) now provides that in AS 43.23.008(a)(2):

Receiving vocational, professional, or other specific education on a full-time basis means attending a program for which, as determined by the Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state at an educational institution eligible to participate in financial aid programs administered by the Alaska Commission on Postsecondary Education.^[30]

On appeal, the division relies on the prior version of 15 AAC 23.163(c)(2) and several decisions applying it in support of its denial of the allowance.³¹ Whether Ms. K.’s application should be considered under the regulation in effect during the qualifying year (2009) or the regulation in effect at the time she applied (2010) depends on whether application of the current version would give retroactive effect to the current version.³² The division has not addressed whether the current version of the regulation should be applied. However, if Ms. K. is ineligible under the current version of 15 AAC 23.153(c)(2), it is not necessary to decide which of the two

²⁹ 15 AAC 23.163, am 1/1/2005, Register 172.

³⁰ 15 AAC 23.163, am 1/1/2010, Register 192.

³¹ See Position Statement at 4, *citing In Re C.L.M.*, OAH No. 09-0275-PFD (Commissioner of Revenue 2009); *In Re K.L.B.*, OAH No. 08-0669-PFD (Commissioner of Revenue 2009); *In Re S.L.P.*, OAH No. 07-0576-PFD (Commissioner of Revenue 2008).

³² AS 44.64.240 states:

If a regulation adopted by an agency...is primarily legislative, the regulation has prospective effect only. A regulation...that is primarily an ‘interpretive regulation’ has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

versions should be applied because she would be ineligible no matter which version of the regulation is applied. Accordingly, before deciding which of the two versions applies, Ms. K.'s application will be considered under the current version.

Read literally, the current regulation would allow an absence for attendance on a part-time basis in any kind of program so long as a comparable program is not reasonably available at an ACPE-eligible educational institution in Alaska. Since the ACLU program that Ms. K. attended appears to be unique to that institution, under a literal reading of the regulation it is possible that she would be eligible for an allowance for her attendance there.

However, to read the regulation literally would expand the nature of the allowable absence beyond the limit specified in AS 43.23.008(a)(2), which is to say, beyond programs involving "full-time" attendance in "vocational, professional, or other specific education." In order to avoid a construction of the regulation that would provide an allowance not identified in statute, the phrases "full-time" and "vocational, professional, or other specific education" must be read as implicitly limiting the words "attending" and "program", thus: "attending [full-time] a [vocational, professional, or other specific education] program for which...a comparable program is not reasonably available in the state at an educational institution...".

But while reading these limiting words into the regulation makes it consistent with AS 43.23.008(a)(2), reading the regulation with those limiting words does not elucidate how the division interprets the terms "vocational, professional, or other specific education." Vocational and professional education are terms that have some generally-understood meaning, and thus may perhaps be administered without further regulatory gloss, but the term "other specific education" does not have any generally-understood meaning.³³ Moreover, 15 AAC 23.163(c)(2) does not identify the content or nature of a program that might be considered as "other specific education."

³³ Prior to enactment of AS 43.23.008(a), allowable absences were addressed in regulation only. The version of 15 AAC 23.163 then in effect provided an allowance for absence while receiving "other special education assistance...to assist in the treatment of learning or physical disabilities." 15 AAC 23.163(c)(3), am 11/20/1996, Register 140. Substantially the same language remained in regulation until 2005, providing a regulatory gloss on the statutory term "other specific education." 15 AAC 23.163(c)(2), am 1/1/1999, Register 148; am 5/9/2003, Register 166. In 2005, however, the regulatory provision for allowance based on attendance in special education was repealed. 15 AAC 23.163, am 1/1/2005, Register 172. From that time forward, it is arguable that there has been no allowable absence for "other specific education", because there has been no regulation identifying any such absence as allowable.

Even though it does not identify the specific types of programs that may be considered “other specific education” within the meaning of AS 43.23.008(a)(2), 15 AAC 23.163(c)(2) can reasonably be read to create one meaningful criterion for determining whether a particular program qualifies as “other specific education.” It would make little sense to read 15 AAC 23.163(c)(2) as providing an allowance for attending a program in another state at other than an educational institution, when the regulation provides that a precondition for availability of the allowance is that no educational institution in Alaska offers a comparable program. The point of the precondition is not to provide an allowance for out-of-state attendance at programs that are typically not offered at educational institutions, but rather to limit it to out-of-state attendance at programs that are typically offered at educational institutions, but for one reason or another (such as a lack of in-state expertise, sufficient students, or appropriate facilities) are not offered at any educational institution in Alaska.

The most reasonable construction of 15 AAC 23.163(c)(2) that is consistent with its evident purpose and that provides a meaningful criterion for determining whether the allowance should be provided would be to read the phrase “at an educational institution” as implicitly limiting the word “program”, thus: “attending [full-time] a [vocational, professional, or other specific education] program [at an educational institution] for which...a comparable program is not reasonably available in the state at an educational institution eligible to participate in financial aid programs administered by [ACPE].” The ACLU, the provider of the program that Ms. K. attended, is not an educational institution. Therefore, the allowance under AS 43.23.008(a)(2) does not apply under the most reasonable construction of the current version of AS 15.23.163(c)(2).

IV. Conclusion

Ms. K. was absent from Alaska during the qualifying year for more than 45 days in addition to the time allowed under AS 43.23.008(a)(1)-(16). She is ineligible for the 2010 Alaska Permanent Fund dividend pursuant to AS 43.23.008(a)(17). Her application is therefore denied.

DATED May 9, 2011.

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 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 6th day of June, 2011.

By: Signed _____
Signature
Andrew M. Hemenway _____
Name
Administrative Law Judge _____
Title

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