

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

In the Matter of:)
)
 M T)
)
2010 Permanent Fund Dividend) OAH No. 11-0191-PFD
 Agency No. 2010-051-8253

DECISION

I. INTRODUCTION

M T submitted an application for a 2010 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (Division) denied her application based on its determination that she had been absent from Alaska for more than 120 days during the 2009 qualifying year in addition to the time she was enrolled as a full-time student in a postsecondary degree program.

Ms. T completed the informal appeal process and then requested a formal hearing. Originally, this matter was scheduled for a telephonic hearing. With the consent of the parties, it was later converted to a hearing by correspondence. Position statements and documentary evidence has been submitted by both parties. Based on the evidence in the record, Ms. T is eligible to receive a 2010 PFD.

II. FACTS

There is no dispute as to the dates of Ms. T's absence from Alaska during 2009. Both parties agree that she was in Alaska for 102 days, absent attending school for 203 days, and absent for other reasons for 60 days.¹ The dispute in this case involves how to characterize 75 of the 203 days she was attending school.² The Division characterizes all 75 days as part-time school attendance; Ms. T asserts she was a part-time student for 41 days and a full-time student for 34 days, March 30 through May 2, 2009.³

During 2009,⁴ Ms. T was enrolled at Oregon Institute of Technology (OIT) to pursue a degree in Renewable Energy Engineering.⁵ She was enrolled at OIT as a part-time student from

¹ Formal Hearing Position Statement, page 6; Applicant's Position Statement, page 5.

² The 75 days were March 30 through June 12, 2009.

³ *Id.*

⁴ The qualifying year for a 2010 PFD is 2009. AS 43.23.095(6).

⁵ Exhibit 6, page 3.

March 30 through June 12, 2009.⁶ From January 12 through May 2, 2009, she was also enrolled as a part-time student at the University of Alaska Southeast (UAS).⁷ The UAS course was taken online.⁸ Thus, for 34 days she was simultaneously enrolled as a part-time student at both institutions. The characterization of these 34 days is important because it will determine if Ms. T was allowably absent for purposes of PFD eligibility.⁹

If Ms. T is not considered a full-time student for the 34 days of simultaneous enrollment, then she was absent from Alaska as a part-time student for 75 days and for other reasons for 60 days, which is a total of 135 days.¹⁰ A person who claims an allowable absence as a full-time student may only claim an additional 120 days of absence and still remain eligible for a PFD.¹¹ Thus, Ms. T would have exceeded her allowable absence by 15 days. If, on the other hand, 34 of those days are counted as full-time enrollment, then she was absent from Alaska as a part-time student for 41 days and for other reasons for 60 days, which is a total of 101 days, which does not exceed the days of allowable absence for full-time students.

III. DISCUSSION

There are several requirements that must be met in order to be eligible for a PFD. One requirement is that the applicant be in Alaska during the entire qualifying year or out of the state for an allowable reason.¹² An applicant may be absent for any length of time while “receiving secondary or postsecondary education on a full-time basis.”¹³ A person who claims an allowable absence as a full-time student may also be absent from Alaska for an additional 120 days for any reason.¹⁴

Receiving secondary or postsecondary education on a full-time basis is defined by regulation:

(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

⁶ Exhibit 2, page 2.

⁷ Exhibit 2, page 1.

⁸ *Id.*

⁹ AS 43.23.005(a)(6).

¹⁰ She was also absent for an additional 128 days as a full-time student.

¹¹ AS 43.23.008(17)(B).

¹² AS 43.23.005(a)(6).

¹³ AS 43.23.008(a)(1).

¹⁴ AS 43.23.008(a)(17)(B).

* * *

(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 accredited by an accrediting agency that the United States Secretary of Education recognizes under 34 C.F.R. Part 602[.¹⁵]

Generally, whether one is a full-time student at a particular educational institution is determined by that institution's own standards of what constitutes full-time.¹⁶

The advent of the internet and online courses has complicated the Division's task of determining when someone is in attendance as a full-time student.¹⁷ This issue was addressed in a 2007 case, *In re B.F.*¹⁸ B.F. was an Alaska resident enrolled as a college student in Hawaii.¹⁹ She took some of her classes online, and if those classes were not counted, she would not have been considered a full-time student.²⁰

The Division argued in *B.F.* that the online courses should not count because B.F. did not need to be in Hawaii to participate in those courses. That argument was rejected.

The division's argument appears to be based on a common sense conclusion that if the student does not need to be physically present in the state where the class is being offered, online attendance should not be regarded as an allowable absence. One can imagine situations, for example, in which an Alaskan student is [in] Arizona claiming an allowable absence for taking online classes from a college on the East Coast. Theoretically a person could be absent from Alaska for the entire year while taking online classes from the University of Alaska and still claim an allowable absence. These kinds of hypothetical situations do raise questions about the intent of the law. At the same time, it does not seem particularly offensive that a student in Ms. F.'s case, who is actually in another state going to college there full-time, might have opted to take a few of her classes through an online program in order to accommodate her schedule. There is no suggestion that Ms. F. was really in Hawaii for other reasons than to go to school full-time.^[21]

After *B.F.* was decided, the PFD regulations were amended. The phrase "where participation requires absence from this state" was added to 15 AAC 23.163(c). This change squarely

¹⁵ 15 AAC 23.163(c).

¹⁶ *In re J.S.*, OAH No. 11-00117-PFD (Dept of Revenue 2011) page 3.

¹⁷ Students have long been able to take one or more "independent study" courses that do not require physical attendance in a classroom. These do not appear to have been identified by the Division as a potential concern, and prior decisions do not address whether taking one or more independent study courses precludes eligibility as a full-time student.

¹⁸ OAH No. 06-0727-PFD (Dept of Revenue 2007).

¹⁹ *In re B.F.*, page 1.

²⁰ *Id.*

²¹ *In re B.F.*, pages 2 – 3.

addresses the situation of a student taking all of his or her classes through an online program.²² A person taking only online courses is not required to be absent from Alaska. The Division argues that this change to regulation was intended to go further and also preclude counting any online coursework towards full-time enrollment.²³ Any other interpretation, according to the Division, would require it to expend an unreasonable amount of effort making a case-by-case determination as to whether each class required absence from the state.²⁴ However, the Division's own form undercuts its argument that this regulatory change was intended to go this far.

When out of state students apply for a PFD, the Division sends a form to the registrar of the school the applicant is attending. This form asks the registrar to verify the student's enrollment status and whether the student is paying resident or non-resident tuition.²⁵ In addition, question four on this form asks: "Is this program an online or distance education program?"²⁶ If the regulatory change was intended to exclude students enrolled in individual online courses, as opposed to online programs, it would need to ask the registrar whether the student was enrolled in an online course. This is demonstrated by an e-mail from OIT's registrar's office that says:

In reference to question #4, the question asks about the program as a whole – if the program can be completed online. The program is not offered online (only) and does required [sic] attendance, even though some classes and work can be completed online. So we answered that question with "No."^[27]

There is no evidence in the record for this case that the regulatory change was intended to exclude all online course work from counting towards a student's status as full-time. Nor does that appear to be the most reasonable interpretation of this regulation. The Legislature has created an allowable absence for individuals receiving secondary education on a full-time basis.²⁸ The regulation clarifies that a student only qualifies for this absence if he or she must be absent from the state to receive that education. In making eligibility determinations, the statute and regulation focuses the Division's attention on whether a student must be absent in order to

²² See *In re J.H.*, OAH No. 10-0589-PFD (Dept of Revenue 2011).

²³ Formal Hearing Position Statement, page 5.

²⁴ *Id.*, page 6.

²⁵ See Exhibit 2, page 1.

²⁶ *Id.*

²⁷ Exhibit 18, page 1.

²⁸ AS 43.23.008(a)(1).

receive his or her education. If a student must be physically present for some of his or her classes, then the student's "participation requires absence from this state[.²⁹]"

In addition, the facts in this case indicate that the Division may not be able to accurately determine which students are studying online and which are physically present in an out of state classroom. Ms. T enrolled in another online class, Ocean Renewable Energy, offered by OIT.³⁰ This does not show up as an online class on her official transcript.³¹ Nor did OIT identify Ms. T's enrollment as being part of an online program when its registrar completed the education verification form because it does not consider the degree program to be an online program even though some classes can be completed online.³²

It is not unreasonable to assume that a majority of college students will take at least one online class, and many will take multiple online classes. As blended learning³³ becomes more prevalent, it may not always even be possible to classify every course as either online or not online. If a course meets two times in person and 15 times online, would that course be online? Would it require physical presence out of state? What about a course that meets eight times online and eight times in person? If the regulatory change was intended to preclude counting any online coursework, the Division will need to do the very thing it seeks to avoid: determine on a case-by-case basis for every class in every academic term whether absence from the state was required.³⁴

Determining whether a student was required to be absent to participate in his or her degree program will not always be easy, but will involve less effort by the Division than making that determination for each class a student takes. As part of its verification efforts, the Division already asks the institution's registrar to indicate whether the program is an online or distance education program. If deemed necessary, the Division could ask an additional question about whether physical presence at the institution was required for participation in the program. Excluding online course work, on the other hand, would require the Division to ask every student attending school outside of Alaska how many credits were taken in an online class during each

²⁹ 15 AAC 23.163 (c)(1).

³⁰ Applicant's Position Statement, page 2.

³¹ Exhibit 13, page 2. The Division only learned that one of Ms. T's classes was an online class because she took that class from a different educational institution. *See* Exhibit 2, page 1.

³² Exhibit 18, page 1; Exhibit 2, page 2.

³³ Blended learning is an instructional approach that mixes different learning environments such as face to face classroom time, online participation, and independent investigation. *See* http://en.wikipedia.org/wiki/Blended_learning.

³⁴ *See* Formal Hearing Position Statement, page 6.

semester. It would then have to determine for each student whether exclusion of the online class or classes would change the student's status from full-time to part-time.

Nothing in the relevant statutory and regulatory language automatically precludes counting online course work towards a student's full-time status. Instead, the focus is on whether the student is pursuing his or her education full-time, and whether absence from the state is a necessary requirement of that pursuit. There is no evidence in the record that Ms. T could have taken all of her OIT courses from Alaska. Instead, the evidence is that attendance on campus was required.³⁵ Thus, participation in her educational program required attendance out of state.

The facts in this case present a somewhat different situation in that Ms. T was taking courses from two different educational institutions. During the spring quarter of 2009, she was not a full-time student at OIT.³⁶ She was, however, taking a semester long class from the UAS that overlapped with the OIT quarter.³⁷ This raises the question of whether a person enrolled as a part-time student at two different institutions can be a full-time student overall.

The applicable statute creates an allowable absence for students receiving education on a full-time basis.³⁸ The applicable regulation, 15 AAC 23.163(c)(1), could be read to require attendance at only one institution on a full-time basis, or to permit attendance at multiple institutions as long as the total course load is equivalent to full-time study.³⁹ The Division has, however, taken the position that physical attendance at two different colleges simultaneously can, at least in some situations, count towards full-time status.⁴⁰

Ms. T was enrolled in the UAS course for the purpose of obtaining a degree or certificate. This course was a part of her degree program at OIT,⁴¹ and she was ultimately able to transfer that credit to her OIT program.⁴² Under the circumstances of this case, it is appropriate to count her UAS course as part of her total credits for determining her status as a full-time student.

³⁵ Exhibit 18, page 1.

³⁶ Exhibit 2, page 2.

³⁷ Exhibit 2, page 1.

³⁸ AS 43.23.008(a)(1).

³⁹ A person could potentially be enrolled simultaneously at several different educational institutions, taking one course at each.

⁴⁰ Exhibit 5, page 18 ("Education absences in which an individual is enrolled and attending two different colleges as a part-time student at each one and by adding the two part-times together may be an allowable absence depending on the circumstances.")

⁴¹ Exhibit 6, page 3; Exhibit 16, page 2.

⁴² Exhibit 10, page 9. The fact that the credits have been transferred is evidence in support of Ms. T's assertion that the purpose of taking the course was for her degree program.

With the additional allowable absence during the spring quarter of 2009, Ms. T was not absent for more than 120 days in addition to her absence as a full-time student. Accordingly, she is entitled to receive a 2010 PFD.

IV. CONCLUSION

Ms. T's participation in an on-line course does not preclude her eligibility for an allowable absence as a full-time student because she was simultaneously required to be absent from Alaska for her other course work and the on-line course was part of the course work towards her degree. The Division's determination that Ms. T is not eligible for a 2010 PFD is REVERSED.

Dated this 24th day of August, 2011.

By: Signed
Jeffrey A. Friedman
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 23rd day of September, 2011.

By: Signed
Signature
Jeffrey A. Friedman
Name
Administrative Law Judge
Title

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