

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

In the Matter of:)	
)	
D E)	
)	OAH No. 11-0339-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-033-2815

DECISION AFTER REMAND

I. Introduction

D E applied for a 2011 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (division) denied his application based on its determination that he had been unallowably absent for more than 180 days during 2010, which is the qualifying year for a 2011 PFD. Mr. E completed the informal hearing process, and then requested a formal hearing. A formal hearing was held by written correspondence. A proposed decision was issued on October 21, 2011, recommending that the division’s decision be affirmed.

Mr. E submitted a proposal for action pursuant to AS 44.64.060(e), requesting that additional issues be considered. Deputy Commissioner of Revenue Angela M. Rodell, as the designee of the Commissioner of Revenue, remanded this matter to the Office of Administrative Hearings for consideration of those issues.

After this matter was remanded, the parties were notified that a supplemental hearing would occur. The division submitted a Supplemental Division Position Statement and exhibits. The parties were then asked to submit briefing and any additional exhibits concerning the proper interpretation of 15 AAC 23.163(c)(2), which relates to an allowable absence for educational purposes.¹ After receiving a supplemental position statement from the division, an order was issued interpreting this regulation, and giving Mr. E an opportunity to demonstrate whether his absence was allowable based on that interpretation.² Based on the new information presented, Mr. E is eligible to receive a 2011 PFD.

¹ Order dated January 4, 2012.
² Order dated February 1, 2012.

II. Facts

When Mr. E submitted his PFD application, he indicated that he had been absent from Alaska for a total of 202 days during 2010.³ He had various reasons for his absence, which can be summarized as follows:

Vacation	39 days
Active Duty Military Service	9 days
John Jay Institute	129 days
Various Professional Training Activities	25 days

Mr. E attended the John Jay Institute and the various professional training activities at the request of his employer, and this training was not available in Alaska.⁴

Mr. E describes the John Jay Institute as

one of a select number of institutions that neither requires nor permits its students to pay tuition. All students are selected after a rigorous selection process that is both merit-based and tuition free. Students may not receive scholarships to help off-set costs associated with the program, as housing and tuition are both provided to the 14 students who are selected and then enrolled into the program each semester. Students who are selected into the program are full-time students in a traditional academic classroom setting for the duration of the academic residency.^[5]

III. Discussion

Being a state resident is one requirement to be eligible for a PFD,⁶ but it is not the only requirement. Among other requirements, one must be physically present in Alaska during the entire qualifying year⁷ or, if absent, absent only for an allowable reason.⁸

There are two allowable absences that are applicable to this appeal.⁹ One may be absent while receiving vocational, professional, or other specific education,¹⁰ or while serving on active duty in the armed forces of the United States.¹¹ A person who is only claiming a military absence may be absent from Alaska for an additional 180 days for any reason consistent with the

³ Exhibit 1, page 2. 15 AAC 23.163(j) defines the method used to count days of absence.

⁴ Exhibit 5, page 3 (Statement attached to Formal Appeal Request).

⁵ Mr. E's Proposal for Action, page 2.

⁶ AS 43.23.005(a)((2) & (3).

⁷ The qualifying year is the year immediately prior to the dividend year. AS 43.23.085(6).

⁸ AS 43.23.005(a)6).

⁹ An educational absence pursuant to AS 43.23.008(a)(1) was not requested by Mr. E, and the institution he attended did not qualify under the requirements of 15 AAC 23.163(c)(1).

¹⁰ AS 43.23.008(a)(2).

¹¹ AS 43.23.008(a)(3).

intent to remain a resident.¹² A person who is claiming an educational absence, either with or without a military absence claim, may be absent for an additional 120 days for any reason consistent with the intent to remain a resident, instead of the 180 days of additional absence available to some other applicants.¹³ This highlights a potential downside to claiming an educational absence. Someone who claims even one day of educational absence loses 60 days of allowable absence under AS 43.23.008(a)(17). In other words, the allowable educational absence is only helpful for maintaining eligibility if the educational absence exceeds 60 days in length.¹⁴

There is no dispute in this case that Mr. E is entitled to claim his military absence. Nor is there any dispute that all of his absences were consistent with the intent to remain an Alaska resident. The only dispute is whether some or all of his educational absence is allowable.

Mr. E claims an educational absence pursuant to AS 43.23.008(a)(2).¹⁵ Under this statute, an absence is allowable if the applicant was

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[.¹⁶]

For purposes of this type of absence, the applicant must be

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.^[17]

Based on the statute and regulation, Mr. E's absence is allowable if he meets two conditions:

1. He was attending a vocational, professional, or other specific education program on a full-time basis; and
2. The Alaska Commission on Postsecondary Education (ACPE) has determined that there is not a comparable program reasonably available in Alaska that Mr. E could have attended.

¹² AS 43.23.008(a)(17)(A).

¹³ AS 43.23.008(a)(17)(B).

¹⁴ Applicants with less than 60 days of an allowable educational absence are better off not claiming that absence at all so as to maintain a full 180 days of additional allowable absence under AS 43.23.008(a)(17)(A).

¹⁵ Exhibit 3, page 4 (informal appeal statement)

¹⁶ AS 43.23.008(a)(2).

¹⁷ 15 AAC 23.163(c)(2).

The division's position is that Mr. E's absence is not allowable because the John Jay Institute's program is not eligible to participate in ACPE financial aid programs. Neither the statute nor the regulation contains a requirement that the out of state program be eligible to participate in financial aid programs. Instead, the regulation clarifies that the Alaska program must be eligible to participate in financial aid for it to be considered comparable.

This issue was addressed in a prior decision, *In re D.P.C. and A.J.C.*¹⁸ That decision discussed the changes to 15 AAC 23.163 (c)(2) that became effective on January 1, 2010.

D.P.C. notes

The key difference in these two versions of the regulation is that in its current form, the regulation no longer requires that the student attend a program that is eligible for loans from ACPE: it now requires only that there be no reasonably available comparable program at an ACPE-eligible educational institution in Alaska.^[19]

D.P.C. specifically rejected the argument made by the division in this case that the program attended by the applicant be eligible for an ACPE loan.

Mr. E has now submitted a letter from ACPE that says, in part,

In response to your February 10, 2012 request, this letter confirms that the Alaska Commission on Postsecondary Education (ACPE) is not aware of any postsecondary education program available in Alaska and eligible to participate in ACPE financial aid programs that offers a program comparable to the one offered by the John Jay Institute, as described in your letter. I would note that the program you reference, offered by the John Jay Institute, is also not eligible to participate in ACPE financial aid programs.^[20]

There is no dispute that Mr. E was absent receiving vocational or professional education on a full-time basis from the John Jay Institute for 129 days in 2010. Exhibit 13 establishes that ACPE has determined that there is no comparable program offered in Alaska that would be eligible to participate in financial aid programs. Thus, this absence is allowable under AS 23.008(a)(2) and 15 AAC 23.163(c)(2).

Mr. E was absent for 64 days in addition to his military absence and his attendance at the John Jay Institute. This is well within the 120 days of cumulative absence allowed for an

¹⁸ OAH No. 10-0182-PFD (Commissioner of Revenue 2010).

¹⁹ *D.P.C.*, at 3 – 4(emphasis added).

²⁰ Exhibit 13, Letter from Stephanie Butler, Director of Program Operations, dated February 13, 2012.

individual who is also claiming an educational absence.²¹ Mr. E is, therefore, eligible to receive a 2011 PFD.

IV. Conclusion

Mr. E was absent from Alaska for a total of 202 days during 2010. Those absences are all allowable under AS 23.008(a)(2), (a)(3), and (a)(17)(B). Accordingly, the division's determination that he is not eligible to receive a 2011 PFD is REVERSED.

Dated this 15th day of February, 2012.

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 21st day of February, 2012.

By: *Signed* _____
Signature
Angela M. Rodell
Name
Deputy Commissioner
Title

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

²¹ AS 43.23.008(a)(17)(B).