

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

In the Matter of)	
)	
F W. Y)	OAH No. 11-0477-PFD
)	Agency No. 2011-062-3506
<u>2011 Permanent Fund Dividend</u>)	

DECISION & ORDER

I. Introduction

F W. Y made a timely application from California for a 2011 Permanent Fund Dividend (PFD), claiming secondary/postsecondary education as the basis for extended absences from the state during the qualifying year. The Permanent Fund Dividend Division found him ineligible on the basis that he was not receiving education “on a full-time basis” as required to make his absence allowable. At the informal appeal level, the agency maintained the denial on the same basis. Mr. Y requested a telephonic formal hearing, which was held before this office on January 31, 2012.

The denial is upheld because a portion of Mr. Y’s extended absence does not qualify as allowable 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

F Y graduated from high school in southeast Alaska in 2006 and enrolled as a non-resident at the University of California-Berkeley later the same year.¹ He graduated from that institution in August of 2011.² The present case focuses on the last year and a half before he graduated.

Mr. Y began the year 2010 in Alaska, where he was spending his winter break. He left Alaska on January 10, and from January 12 through May 14 he was enrolled at Berkeley, paying for and carrying a full-time course load.³ He attended all of his classes, and it is more likely than not that he was passing all of them until the final exam.⁴ However, he failed two of his exams and failed the courses associated with them, so that he did not receive credit for eight of the fourteen

¹ Exhibit 2, p. 5.
² *Id.*
³ Exhibit 2, page 2; testimony of Mr. Y.
⁴ Testimony of Mr. Y.

semester hours he was carrying.⁵ The parties do not dispute that the balance of his course load, if the two failed classes were disregarded, would not represent a full-time load at Berkeley.

Mr. Y remained in California for another 25 days after the semester ended, and then spent the period from June 8 to August 23 in Alaska.⁶ From August 26 to December 17 he was again enrolled at Berkeley, this time as a part-time student.⁷ He seems to have remained in California over the winter break that followed that semester. He remained in part-time status as a student through the 2011 spring semester and summer term until he graduated.⁸

Mr. Y explains that in the fall of 2010 he was writing a thesis with a professor, which was very demanding work. The university assigns this work a value, however, and that value is four semester hours. Mr. Y took only one other course that fall, another four-credit course.⁹ In the ensuing spring and summer Mr. Y took a very light load as he needed only a few credits to graduate.¹⁰ He took four semester hours in the spring and three in the summer.¹¹

In 2010, Mr. Y was absent from Alaska a total of 280 days. Of that time, approximately 123 days are attributable to the spring semester, 114 days to the fall semester, and the balance (about 40 days) to unspecified activities.

III. Discussion

In this appeal, Mr. Y has the burden of proving that the denial of his PFD was incorrect.¹² Specifically, he needs to prove that he qualifies for one of the allowable absences he is claiming.

The qualifying year for the 2011 dividend was 2010.¹³ In order to qualify for a Permanent Fund Dividend in 2011, 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 43.23.008.¹⁴ There are two of the allowable absences that potentially apply to Mr. Y.

⁵ *Id.*; Exhibit 2, p. 5. Mr. Y ultimately received seven credits that were attributed to the spring 2010 semester, even though he passed only six credits’ worth. This seems to relate to a subsequent adjustment when he repeated the mathematics course he had failed (the adjustment is reflected in a G1 code on the transcript).

⁶ Exhibit 1, p. 3; Exhibit 3, p. 1.

⁷ Exhibit 2, p. 1.

⁸ Testimony of Mr. Y.

⁹ Exhibit 2, p. 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² 15 AAC 05.030(h).

¹³ AS 43.23.095(5).

¹⁴ AS 43.23.005(a)(6).

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.¹⁵ Since Mr. Y was absent for 280 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. Moreover, and of key importance for this case, if the second type of allowable absence is the one for secondary/postsecondary education discussed below, the maximum amount of residual absence that can be covered by the catchall provision is reduced from 180 days to 120 days.¹⁶

The second potentially applicable provision is the focus of Mr. Y's appeal: an absence "receiving secondary or postsecondary education on a full-time basis."¹⁷ 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," and this regulation will have some bearing on the discussion that follows.

Mr. Y had two periods during the qualifying year that he seeks to bring within the educational absence, and the Division disallowed each of them for a different reason. The first period is the spring semester of 2010, in which Mr. Y enrolled in and paid for full-time instruction, but ultimately failed two of his courses. The Division contends this made him a part-time student for that period.

On this issue, the Division's argument is unpersuasive. The statute requires only that the individual be "receiving . . . education on a full-time basis"; it does not require success, and it does not require that the person succeed in gaining academic credit. A prior Revenue decision, *In re L.D.*,¹⁸ is instructive. In that case, a student had enrolled full-time but had dropped a course partway through the term, reducing her load below the full-time threshold. The Division took the position that she was a full-time student *until* the date she dropped the class, and the administrative law judge, acting as delegee of the Commissioner of Revenue, agreed. It would be anomalous if a student could benefit from full-time status up to the date of withdrawal if she voluntarily gave up on a class, but if she stuck with it, gave it her best effort, and ultimately failed, she would be treated as though she had never signed up in the first place and deemed a part-time student all the way back to the first day of the term. Yet that is what the Division advocates in Mr. Y's appeal.

¹⁵ AS 43.23.008(a)(17)(A).

¹⁶ AS 43.23.008(a)(17)(B).

¹⁷ AS 43.23.008(a)(1).

The better way to view Mr. Y's situation is that so long as he was a paid-up student, attending and passing enough classes to be a full-time load, he was a full-time student in good standing. Mr. Y remained in that status all the way to the end of the semester, failing only at the very end. Accordingly, the 123 days that he was enrolled at U.C. Berkeley during the spring of 2010 qualify as an allowable absence for postsecondary education.

This, however, does not get Mr. Y all the way to eligibility. After the 123 days are subtracted, he still has 157 days of absence from Alaska in 2010. As noted above, if he is relying on an educational absence (as he must to excuse his spring semester absence), Mr. Y is entitled to only 120 days of residual absence under the catchall provision. Thus, he must still get at least part of the fall semester within the educational provision.

In the fall semester, Mr. Y contends that he was effectively engaged in full-time studies because writing an undergraduate senior thesis was so demanding. However, his educational institution assigned this work a value of only four semester hours and assessed his overall load as part-time. He was not, therefore, a full-time student at that institution.

Nonetheless, the Department of Revenue's regulatory definition of full-time status provides an avenue by which a student can, in one special circumstance, still qualify as full-time for PFD purposes even though not full-time under the rules of the academic institution. 15 AAC 23.163(c)(1)(B) provides that "an individual in the last academic year before graduation who was carrying enough credits to graduate, but fewer than full-time credits for any one term, semester, or quarter, is considered to have been a full-time student at that time." Mr. Y was within his final academic year before graduation during the fall of 2010.

The purpose of this provision is to account for students who can progress toward graduation at a full-time pace but, because they do not need many more credits, can take less than a full load for one term during their final academic year without delaying graduation. This does not describe Mr. Y. Mr. Y began school in the fall of 2010 just one full-time semester short of graduation. He elected to spread this work over three part-time semesters. In so doing, he exceeded the "any one term" limitation in the regulatory provision quoted above, and he cannot be deemed to have been in full-time status for purposes of calculating PFD eligibility.

Accordingly, Mr. Y's fall semester in 2010 was not covered by the allowable absence provision for receiving education. As a result, even after allowing his spring semester absence as

¹⁸ OAH No. 09-0086-PFD (Commissioner of Revenue 2009).

educational, he still had 157 days that must be accounted for under the catchall provision for absences not within another exception. Since that provision only allowed someone in Mr. Y's position 120 days of absence beyond his spring semester studies, he had 37 days outside Alaska that did not fit within any allowable absence provision.

IV. Conclusion

Because he was absent from the state for part of the qualifying year and a portion of his absence was not allowable for PFD purposes, Mr. Y is not eligible for the 2011 PFD. The decision of the Permanent Fund Dividend Division to deny the application of F W. Y for a 2011 Permanent Fund Dividend is AFFIRMED.

DATED this 1st day of February, 2012.

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 28th day of February, 2012.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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