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

In the Matter of :	)
	) OAH No. 12-0418-PFD
E D and	) DOR Nos. 2012-062-8698 & 8700/
F X (minor)	) 2011-066-0412/2011-040-5319/2010-016-9266
	) & 9459

DECISION

I. Introduction

E D is an officer in the United State Public Health Service. She applied for, was found eligible, and was paid 2010 Alaska Permanent Fund dividends for herself and her daughter, F X. Her applications for the 2011 and 2012 dividends for herself and her daughter were denied,[1] and in addition the Permanent Fund Division issued a letter notifying her that the 2010 dividends had been paid in error, but need not be repaid.[2] Following informal conferences, the division issued decisions purporting to sustain the denial of the 2010 applications and the assessment of the 2010 dividends and confirming that they need not be repaid,[3] and sustaining the denial of the 2011 and 2012 dividends.[4] Ms. D filed a timely appeal and the matter was referred to the Office of Administrative Hearings.

The administrative law judge conducted a telephonic hearing on November 1, 2012. Ms. D participated and Pete Scott represented the division. Ms. D argued that periods of time she was absent from the state as an officer in the United States Public Health Service should be considered allowable absences. Because the parties agree that the division correctly decided not to seek repayment of the 2010 dividends, that decision is affirmed. Because Ms. D was not detailed to the armed forces or subject to the Uniform Code of Military Justice in 2010, the division's decision to deny the 2011 dividends is affirmed. Because Ms. D was detailed to the Department of Defense and was subject to the Uniform Code of Military Justice in 2011, the applications for the 2012 dividends are granted.

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1 Ex. 11, 29 (2011); Ex. 16, 35 (2012).
2 Ex. 4, 21.
3 Ex. 6, 25.
4 Ex. 13, 31 (2011; Ex. 19, 37 (2012).

II. Facts

E D is a career officer in the United States Public Health Service[5] who first moved to Alaska in August, 2003, when she was commissioned and, at her request, was assigned to duty with the Indian Health Service in Anchorage.[6] At that time, Ms. D was married (as E X)[7] and had five children, including three sons and two daughters.[8] Upon their arrival, the family bought a house, which they sold in 2005 when they purchased a new, larger home in No Name.[9]

In 2007, Ms. (X) D divorced and remarried.[10] As E T, she was paid Alaska Permanent Fund dividends in 2008 and 2009.[11] She built a new home, smaller, which she intended would be her home upon her retirement.[12]

Effective January 26, 2009, Ms. (T) D was detailed to the Department of Homeland Security, Immigration Customs and Enforcement, Division of Immigration Health Services, at a duty station in Leesport, Pennsylvania.[13] Ms. D departed for her new duty station towards the end of January, 2009.[14] Her older children remained in Alaska, living in the home Ms. D owned; Ms. D agreed that her former husband, their father, would lease the home and look after them.[15] F X, her youngest child, went with her mother to Pennsylvania and attended school there for the remainder of the 2008-2009 school year.[16]

From May 10-17, 2009, Ms. D and F returned to Alaska for Ms. D's son's high school graduation.[17] On September 19-30, 2009, Ms. D visited her older children in Alaska on the occasion of her older daughter's wedding.[18] F returned to Alaska with her mother and remained behind to live with her father and siblings at Ms. D's house, spending the remainder of the 2009-2010 school year enrolled in school in Alaska.[19] When Ms. D returned to Pennsylvania she enrolled in a Master of Science (Nursing) graduate program at Drexel University in Philadelphia,

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5 *See* Ex. 12, pp. 9-10.
6 Ex. 2, p. 3; Ex. 39, p. 13.
7 *See* Ex. 1, p. 5.
8 *See* Ex. 2, p. 7; Ex. 17, p. 12; Ex. 39, p. 13.
9 *See* Ex. 17, p. 11.
10 *See* Ex. 10, p. 21 ("I was X, then I married and my name was T….I divorced in 2009 and I later changed my name back to X so that it would be the same as my children. I have since re-married and my name is now D.").
11 Ex. 1, p. 5.
12 Ex. 17, p. 11; Ex. 39, pp. 16-17.
13 Ex. 2, p. 3. *See* Ex. 39, p. 4.
14 *See* Ex. 7, pp. 2-3.
15 *See* Ex. 17, p.11; Ex. 39, p. 18.
16 F moved to Pennsylvania to be with her mother over spring break, on March 10. Ex. 20, p. 3.
17 Ex. 24, pp. 13, 17.
18 Ex. 14, p. 3.
19 Ex. 20, p. 3; Ex. 23, p. 8; Ex. 24, p. 15.

taking six credit hours in the fall quarter (September 19-December 12)[20] while continuing to work full time.[21]

Ms. D filed for the 2010 dividends for herself and F on January 17, 2010.[22] In February, 2010, due to non-payment of rent by her tenant, Ms. D found it necessary to sell her home in Alaska.[23] She sold the Alaska home and placed her household goods in a storage facility in Eagle River.[24] In May, 2010, Ms. D visited her children in Alaska for ten days, during which she attended her older daughter's high school graduation.[25] Subsequently, her older daughter's husband joined the United States Air Force and the couple moved to his duty station in Germany.[26] F returned to Pennsylvania with her mother on May 22, 2010,[27] and was enrolled in school in Pennsylvania as a sixth grader for the 2010-2011 school year.[28] During the calendar year 2010, Ms. D continued with her graduate program, taking six credits in the winter (January 1-March 20) and spring (March 29-June 12) quarters and three credits in the summer (June 21-September 4) and fall (September 20-December 11) quarters.[29]

Ms. D visited her children in Alaska again for two weeks from June 17 to July 1, 2011.[30] F travelled to Alaska with her mother on June 17.[31] Ms. D was also accompanied by her fiancé, and during their visit to Alaska the couple was married in Girdwood.[32] Five days after the wedding, on June 29, Ms. D received orders from the United States Public Health Service detailing her to duty with the Department of Defense at a United States Army hospital at Fort Carson, Colorado, effective July 11.[33] She left Alaska on July 1.[34] While detailed to the Department of Defense, Ms. D was subject to the Uniform Code of Military Justice.[35] F remained in Alaska living with her father until August 5, when she went to Colorado to live with

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20 Ex. 43, p. 1; Ex. 39, p. 19; Ex. 45, p. 14.
21 Ex. 39, p. 12.
22 Ex. 1; Ex. 24.
23 Ex. 39, p. 19.
24 *See* Ex. 15, p. 8; Ex. 17, p. 11.
25 Ex. 8, p. 2; Ex. 14, p. 3; Ex. 17, pp. 10-12. The daughter's name is not in the record.
26 Ex. 17, p. 11.
27 Ex. 27, pp. 1-2.
28 Ex. 20, p. 3; Ex. 23, p. 8; Ex. 24, p. 5.
29 Ex. 43, p. 1; Ex. 45, p. 14.
30 Ex. 33, p. 9.
31 Ex. 33, p. 12.
32 Ex. 5, p. 2; Ex. 9, p. 3.
33 Ex. 9, p. 4.
34 Ex. 15, p. 9.
35 Ex. 9, p. 4. *See* 42 U.S.C. §215(a); 10 U.S.C. §802(a)(8).

her mother.[36] That fall, Ms. D's youngest son, B, moved down to Colorado to join his mother and F for the 2011-2012 school year, returning to Alaska in May, 2012.[37] During the 2011 calendar year Ms. D took three credits at Drexel in the winter quarter (January 3-March 19).[38] She took no other courses in 2011.[39]

III. Discussion

A. Jurisdiction: 2010 Dividend Informal Conference Decisions

Before considering the merits of the division's informal conference decisions with respect to the 2010 dividends, it must first be determined whether the Office of Administrative Hearings has jurisdiction.[40] The Office of Administrative Hearings has jurisdiction to "conduct all adjudicative administrative hearings required under [AS 43.23] or regulations adopted to implement the statute[]."[41]

AS 43.23.015(g) provides that an individual may appeal "a decision of the department determining the individual's eligibility for a permanent fund dividend." The division contends that AS 43.23.015(g) provides Ms. D with the right to appeal to the Office of Administrative Hearings from the division's decisions with respect to the 2010 dividends, because those decisions determined that she was ineligible for purposes of 15 AAC 23.233.[42]

Although the informal conference decisions address Ms. D's eligibility, it is an open question whether those decisions "determined" eligibility within the meaning of AS 43.23.015(g). Ms. D filed applications for the 2010 dividend under AS 43.23.015, and the division determined that she and her daughter were eligible.[43] The dividends were paid in October, 2010. In 2012 the division was determining under AS 43.23.035(b) whether the 2010 dividend "should not have been paid" and, based on that determination, whether to seek repayment under 15 AAAC 23.233. To determine that a dividend "should not have been paid" is

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[36] Ex. 36, pp. 5, 7.

[37] Ex. 17, p. 12; Ex. 20, p. 3.

[38] Ex. 43, pp. 1-2; Ex. 45, p. 14.

[39] Ex. 43, pp. 1-2.

[40] It is well established that an adjudicative tribunal, including an administrative agency acting in a quasi-judicial capacity, must consider jurisdiction, *sua sponte*, when the issue is noticed. *See, e.g.*, Monzulla v. Voorhees Concrete Cutting, 254 P.3d 341, 344 (Alaska 2011).

[41] AS 44.64.030(a)(33). AS 44.64.030(b) also provides jurisdiction over individual cases, at the request of a referring agency, pursuant to a written agreement. This case was not referred to the Office of Administrative Hearings under AS 44.64.030(b).

[42] Supplemental Position Statement, p. 2. 15 AAC 23.233(c) provides that under certain circumstances, "[t]he department will not assess a previously paid ineligible individual."

[43] *See* Ex. 3, p. 1 ("I have completed processing your 2010 PFD application and you are now deemed eligible.").

quite different from determining whether an individual was eligible. There are a number of circumstances in which payment should not be made to an eligible individual, such as when the individual has intentionally provided deceptive information, or when the dividend has been attached or taken by a state agency.[44] Nothing in AS 43.23.035(b) mandates that the division make an eligibility determination, and, even if it does so, it is not making an eligibility determination under AS 43.23.015, but rather under AS 43.23.035(b). Moreover, under 15 AAC 23.233(c) the division will forego collection on grounds that are independent of the individual's eligibility. Arguably, the right to appeal to the Office of Administrative Hearings pursuant to AS 43.23.015(g) and AS 44.64.030(a)(23) is limited to eligibility determinations made under AS 43.23.015, and it does not extend to eligibility determinations made under AS 43.23.035 or the decision not to seek repayment under 15 AAC 23.233(c).[45]

The Office of Administrative Hearings issues decisions in contested cases within its jurisdiction, but does not issue advisory opinions when it does not have jurisdiction. In order to avoid issuing an advisory opinion, when jurisdiction is questionable it is within an adjudicator's discretion to decline to address issues that need not be dealt with. In this case, assuming that the Office of Administrative Hearings has jurisdiction, and assuming that Ms. D was ineligible for the 2010 dividend, the issue that would remain for consideration on appeal is whether the division correctly decided not to seek repayment. In declining to seek repayment, the division relied on 15 AAC 23.233(c). The division does not assert that it erred in doing so, nor does Ms. D. Since the parties agree that under 15 AAC 23.233(c) repayment was not required or appropriate, the division's decision not to seek repayment under 15 AAC 23.233(c) may be affirmed without addressing the division's determination under AS 43.23.035(b) that the dividend should not have been paid.

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[44] *See* AS 43.23.065-.073; AS 15 AAC 23.103(j).

[45] There is a separate appeal path for eligibility determinations made under AS 43.23.035(b), but only after assessment. *See* AS 43.05.245 (following assessment, the taxpayer [dividend recipient] may provide evidence at an informal conference under AS 43.05.240); AS 15.05.010(a)(3)(B), (b)(5), (h) (stating procedural requirements for appeal from dividend assessment, including prior request for informal conference). In this case, that appeal path is unavailable , because no assessment occurred. Under AS 43.23.0245, an "assessment…occurs when the department issues a notice and demand for payment[,]" and in this case the division did not demand payment. *Cf.* Hickel v. Halford, 872 P.2d 171, 173 (Alaska 1994) (characterizing an "assessment" as a "notice of assessment and demand for payment").

B. 2011 Eligibility: Qualifying Year 2010

The division's informal conference decision asserts that Ms. D was ineligible for the 2011 dividend because she was absent from Alaska for more than 180 days in the qualifying year, 2010, in addition to the absence allowed by law to maintain eligibility.[46] Ms. D asserts that she was entitled to claim an absence for "serving on active duty as a member of the armed forces of the United States[,]" as permitted by AS 43.23.008(a)(3)(A). She also asserts that she was entitled to claim an absence for "receiving…postsecondary education[,]" as permitted by AS 43.23.008(a)(1).

The underlying facts are not in dispute. Throughout 2010, the qualifying year for the 2010 dividend, Ms. D was detailed to the Department of Homeland Security, Immigration Customs and Enforcement, Division of Immigration Health Services, in Leesport, Pennsylvania.[47] Also in 2010, Ms. D was enrolled in a graduate program at Drexel University for six credits in the winter (January 1-March 20) and spring (March 29-June 12) quarters and three credits in the summer (June 21-September 4) and fall (September 20-December 11) quarters.[48]

1. Ms. D Was Not A Member of the Armed Forces In 2010

A statutory allowance is available for persons absent while "serving on active duty as a member of the armed forces."[49]

Ms. D argues that her service while detailed to the Department of Homeland Security should be considered as service on active duty as a member of the armed forces, because the United States Public Health Service is "one of the seven uniformed services that wears the uniform every day."[50] She notes that the United States Coast Guard is part of the Department of Homeland Security,[51] and she asserts this "should make a USPHS officer eligible."[52]

This is not the first time that the commissioner has confronted the question whether an officer in the United States Public Health Service should be considered as serving on active duty for purposes of the eligibility for the Alaska Permanent Fund dividend. The commissioner has previously issued decisions concluding that although service in the United States Public Health

46 Ex. 11, p. 1. *See* AS 43.23.008(a)(17).
47 Ex. 2, p. 3.
48 Ex. 43, p. 1; Ex. 45, p. 14.
49 AS 43.23.008(a)(17).
50 Ex. 12, p. 3.
51 Ex. 12, p. 3.
52 Ex. 38, p. 2. See Ex. 39, p. 1

Service is service in one of the uniformed services, it is not service "as a member of the armed forces" within the meaning of AS 43.23.008(a)(3)(A), unless the individual has been detailed to the Army, Navy, Air Force, Marines or Coast Guard.[53] Ms. D's argument that because she was detailed to the Department of Homeland Security she should be treated as if she were a member of the armed forces is not persuasive: she was detailed to the Department of Homeland Security, Immigration Customs and Enforcement, which is a civilian agency. She was not detailed to the United States Coast Guard. Therefore, under the commissioner's prior decisions, her absence did not fall within AS 43.23.008(a)(3)(A).[54]

2. Ms. D Was Not Enrolled In Postsecondary Education Full Time

Ms. D also asserts that she was entitled to claim an absence for "receiving…postsecondary education on a full-time basis[,]" as permitted by AS 43.23.008(a)(1). Pursuant to 15 AAC 23.163(c)(1), this means "enrollment and attendance in good standing as a full-time student."

Generally, if a student meets an educational institution's own standards for full time status, the division will consider that person to be enrolled as a full time student.[55] Drexel University considers a graduate student to be enrolled full time if the student is enrolled for nine

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[53] In Re M & C. K., at 3-4, OAH No. 09-0199-PFD (Commissioner of Revenue 2009); In Re T. & S. W., at 2, OAH No. 06-0427-PFD Commissioner of Revenue 2006); In Re P. & S. M., at 3, Caseload No. 010665 (Department of Revenue 2002).

[54] Application of the allowable absence provision for service in the armed forces to an officer in the United States Public Health Service has been the subject of litigation in at least two superior court cases. Superior Court Judge Dana Fabe, presently the Chief Justice of the Alaska Supreme Court, concluded in 1993 that "the State Department of Revenue may not constitutionally distinguish between P[ublic] H[ealth] S[ervice] officers and members of the armed forces…for purposes of applying the allowable absence provisions of AS 43.23.095(7) and 15 AAC 23.665." *See* In Re P. & S. M., *supra*, at 1-3, *citing* McCarthy v. State, Department of Revenue, No. 3 AN-91-10607-CI (Superior Court). *See also* Aoyama v. Rexwinkle, No. 3AN 92-3907-CI (Superior Court). (Copies of the administrative decision and partially dispositive orders in the court cases are on file with the Office of Administrative Hearings.) Former 15 AAC 23.665(c)(7) (repealed effective April 1, 1989) created an allowable absence "for active service in a branch of the armed forces of the United States." This is slightly different language than current AS 43.23.008(a)(3)(A), which creates an allowable absence while "serving on active duty as a member of the armed forces of the United States." Service "in" the armed forces might be construed as a broader category than service "as a member" of the armed forces. Moreover, even if the legal issue decided in McCarthy was identical to the legal issue in this case, Judge Fabe's ruling may not have been a final decision entitled to preclusive effect. *See* State v. United Cook Inlet Drift Association, 895 P.2d 947, 954 (Alaska 1995) (when a purely legal issue has been decided by a final decision of the superior court in a case to which the State of Alaska was a party, the State may relitigate the issue "so long as the subject matter of the second case is 'substantially unrelated' to that of the first."). However, it is a fundamental rule of statutory construction that statutes are construed to avoid constitutional infirmities, and in order to avoid any possible constitutional issue with respect to AS 43.23.008(a), the commissioner could choose to adopt a different interpretation than was adopted in the prior administrative decisions.

[55] *See* In Re K. A., at 3, OAH No. 09-0123-PFD (Commissioner of Revenue 2009).

credit hours in a quarter.[56] Ms. D never took more than six credit hours per quarter, and thus she was never a full time student under Drexel's standards.

That Ms. D was not a full time student under Drexel's standards does not preclude treating her as enrolled full time for purposes of 15 AAC 23.163(c)(1), however. Special circumstances may warrant treating a person as enrolled full time for purposes of 15 AAC 23.163(c)(1) even if the person is not considered a full time student under the educational institution's rules.[57] In one case, for example, a graduate student who was enrolled for only two credit hours was considered to be a full time student because she was conducting research and working on her dissertation full time while absent on a post-graduate fellowship.[58] In another case, a student with a disability was considered a full time student because "functional limitations placed upon him by his physical disability" prevented him from taking a full credit load.[59] In this case, Ms. D argues that because she was working full time while attending graduate school, and attended school throughout the year, she should be considered full time.[60] But a student's decision to work in addition to attending school, even if the product of financial necessity, is not a special circumstance warranting treatment as a full time student for purposes of 15 AAC 23.163(c)(1).[61]

3. F X's Eligibility

In the fall of 2009, F X returned to Alaska to live with her father and siblings at Ms. D's house, and she attended school in Alaska for the entire 2009-2010 school year.[62] Her mother visited Alaska in May, 2010, and F returned to Pennsylvania with her mother on May 22, 2010,[63] and was enrolled in school in Pennsylvania as a sixth grader for the 2010-2011 school year.[64] She did not return to Alaska in 2010 after May 22. Thus, F was absent from Alaska during 2010 more than 180 days.

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56 Ex. 45, pp. 1, 4. This appears to be standard practice for graduate students. *See* In Re G. S., at 1, OAH No. 10-0018-PFD (Commissioner of Revenue 2010) ("At Texas Tech, nine credits [per semester] is considered full-time enrollment for graduate students, as opposed to twelve hours for undergrads.").

57 *See* In Re K. A., at 3-4, OAH No. 09-0123-PFD (Commissioner of Revenue 2009).

58 In Re J.K., Department of Revenue Caseload No. 010381 (January, 2002).

59 In Re M.F., *et al.*, OAH No. 06-0722-PFD (Commissioner of Revenue 2007).

60 *See* Ex. 39, p. 12.

61 In Re K. A., at 4, OAH No. 09-0123-PFD (Commissioner of Revenue 2009).

62 Ex. 20, p. 3; Ex. 23, p. 8; Ex. 24, p. 15.

63 Ex. 27, pp. 1-2.

64 Ex. 20, p. 3; Ex. 23, p. 8; Ex. 24, p. 5.

An individual who is absent for more than 180 days is ineligible unless entitled to one or more of the allowances specified in AS 43.23.008(a).[65] As her mother's absence was not for a reason specified in AS 43.23.008(a)(3), (6), (8), or (13), F is not entitled to the allowance for minors accompanying an eligible resident under those provisions.[66] As she was not yet in seventh grade, her absence was not allowable under AS 43.23.008(a)(1).[67] None of the other provisions of AS 43.23.008(a) apply, and F is therefore ineligible for the 2011 dividend.

C. 2012 Eligibility: Qualifying Year 2011

The division's informal conference decision asserts that Ms. D was ineligible for the 2012 dividend because, among other reasons, she was absent from Alaska for more than 180 days in the qualifying year, 2011, in addition to the absences allowed by law to maintain eligibility.[68] Ms. D, as she did with respect to the 2011 dividend, asserts that she was entitled to claim an absence for "serving on active duty as a member of the armed forces of the United States[,]" as permitted by AS 43.23.008(a)(3)(A).[69]

Again, the underlying facts are not in dispute. At the beginning of 2011, Ms. D was still working full time in Pennsylvania, detailed to the Department of Homeland Security. F was living with her, attending primary school in Pennsylvania.[70]

Ms. D visited Alaska for two weeks from June 17-July 1, 2011.[71] Effective July 11, 2011, Ms. D was detailed to the Department of Defense at Fort Carson, Colorado and was subject to the Uniform Code of Military Justice. F travelled to Alaska with her mother on June 17[72] and remained in Alaska living with her father until August 5, 2011, when she went to Colorado to live with her mother.[73]

1. Ms. D Served As A Member of the Armed Forces in 2012

As previously noted, the commissioner has previously issued decisions concluding that an officer in the United States Public Health Service is generally not considered to be serving as

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65 *See* AS 43.23.008(a)(17).
66 AS 43.23.008(a)(13).
67 15 AAC 23.163(c)(1)(A).
68 Ex. 19, p. 1. *See* AS 43.23.008(a)(17).
69 Ms. D does not appear to argue that she is entitled to a claim an allowable absence for education in 2011. In any event, it is clear that she is not entitled to an allowable absence for education in 2001, because her circumstances in 2011 were just as they were in 2010.
70 Ex. 17, p. 11; Ex. 20, p. 3.
71 Ex. 33, p. 9.
72 Ex. 33, p. 12.
73 Ex. 36, pp. 5, 7.

a member of the armed forces for purposes of AS 43.23.008(a)(3)(A), but is considered to be serving as a member of the armed forces if detailed to the Coast Guard, Army, Navy, Air Force or Marines. Consistent with those prior decisions, Ms. D is not entitled to claim an allowable absence during the period of time in 2011 that she was detailed the Department of Homeland Security. Effective July 11, 2011, however, Ms. D was detailed to the Department of Defense at United States Army base. During that time, she was subject to the Uniform Code of Military Justice. The commissioner's prior decisions do not distinguish between being detailed to the Department of Defense with a duty station on a military base, and being detailed to the military branch.[74] Moreover, those decisions identify the status of being subject to the Uniform Code of Military Justice as the central reason why a United States Public Health Service detailed to the armed forces should be treated as serving as a member of the armed forces for purposes of AS 43.23.008(a)(3)(A).[75] The Uniform Code of Military Justice applies to an officer of the United States Public Health Service when the officer is "assigned to and serving with the armed forces."[76] Accordingly, consistent with the commissioner's prior decisions, Ms. D's service while detailed to the Department of Defense and subject to the Uniform Code of Military Justice should be treated as service with the armed forces for purposes of AS 43.23.008(a)(3)(A).

Ms. D was in Alaska for fourteen days in 2011, and was absent for 351 days. She was detailed to the Department of Defense and subject to the Uniform Code of Military Justice from July 11 through December 31, a total of 174 days. Thus, she was absent from Alaska for 177 days in addition to the time allowed under AS 43.23.008(a)(3)(A). Her absence falls within allowable limits, pursuant to AS 43.23.008(a)(17)(A). Because Ms. D's absence is allowable under AS 43.23.008(a)(3)(A), F's absence while with her is also allowable.[77]

2. Ms. D Is An Alaska Resident

The division's informal conference decision concludes that, as a separate ground for denial of the 2012 dividends, Ms. D was ineligible because her residence was severed "when

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[74] Ms. D was detailed to the Department of Defense under a Memorandum of Agreement dated April 15, 2008. *See* Ex. 9, p. 4. That Memorandum of Agreement is not in the record, and thus the specific terms under which she was detailed to the Department of Defense are unknown.

[75] *See* In Re M & C. K., at 3, OAH No. 09-0199-PFD (Commissioner of Revenue 2009), quoting In Re P. & S. M., at 3, Caseload No. 010665 (Department of Revenue 2002).

[76] 10 U.S.C. §802(a)(8).

[77] AS 43.23.008(a)(3)(A).

your 2010 application denial was upheld in an Informal Appeal decision dated August 3, 2012."[78]

The division's position is that Ms. D's status as a resident was resolved in 2010. In making this argument, the division implicitly relies on the legal doctrine of collateral estoppel. Under the doctrine of collateral estoppel, a person who was a party to an administrative proceeding (Ms. D) may be barred from relitigating an issue (status as an Alaska resident) that: (1) was decided in a final administrative decision; (2) is identical to the issue in the later case; and (3) was essential to the final decision in the prior case.[79]

In this case, the doctrine of collateral estoppel does not apply, because neither the first nor the third prerequisite for application of the doctrine has been met. With respect to finality, the Informal Conference decision issued in 2010 was not a final administrative decision: rather, this decision is the final administrative decision with respect to the 2010 dividend. This decision concludes only that the division did not err in deciding not to assess the 2010 dividend. Moreover, Ms. D's status as a resident was not essential to the division's informal conference decision, either with respect to whether the determination that the 2010 dividend should not have been paid or with respect to whether it should be assessed. Her status as a resident was not essential to the determination that the dividend should not have been paid, because the division determined that Ms. D was ineligible on multiple grounds, including at least one (allowable absence) that is entirely independent of her status as a resident. Similarly, the determination not to seek reimbursement was based on a ground entirely independent of her status as a resident. For these reasons, the division's 2010 decision with respect to Ms. D's status as a resident is not controlling.

That the Informal Conference decision is not controlling does not end the inquiry, however. The division, in denying the 2012 dividend, asserted that Ms. D was not a resident, and it referenced substantial evidence in support of such a finding. Even though the division did not make a new finding with respect to residence in 2012, it did sufficiently raise the issue so as to require Ms. D to prove at the hearing with respect to her 2012 dividend that she did at all times during the qualifying year and through the date of her application retain the intent to return

[78] Ex. 19, p. 2.

[79] *See, e.g.*, State, Department of Health and Social Services, Office of Children's Services v. Doherty, 167 P.3d 64, 71 (Alaska 2007).

to Alaska and remain indefinitely.[80] Moreover, Ms. D addressed that issue directly in her appeal. It is therefore appropriate to consider Ms. D's status as a resident in light of the evidence presented.

Review of the record shows that there is no evidence that Ms. D at any time has established legal residence in another state. She has retained her paper ties to Alaska, listed Alaska as her state of residence in her official work records, and regularly returned to the state to visit her children here. She chose to be married in Alaska. One of her children married a fellow Alaskan resident before leaving the state under military orders, and another lives here still. She has made consistent attempts to find a posting in Alaska within the United States Public Health Service but has thus far been unsuccessful. When due to financial exigencies she was forced to sell her home here, she stored her household belongings in Alaska. While it may be that over time her ties and commitment to Alaska will wane, at this time the clear preponderance of the evidence is that at all times since she left Alaska in 2009, Ms. D has retained the intent to return to Alaska and remain indefinitely.

IV. Conclusion

The division's decision not to seek repayment of Ms. D's 2010 dividend was not challenged by either party. Ms. D is ineligible for the 2011 dividend because while absent during the qualifying year she was detailed to a civilian agency in the Department of Homeland Security and was not subject to the Uniform Code of Military Justice. Because Ms. D was ineligible, F X's absence while accompanying her is not allowed, and she is therefore also ineligible. Ms. D is eligible for the 2012 dividend because she retained her Alaska residence and her absence during the qualifying year was within the time allowed by law, because for 174 days she was absent while detailed to the Department of Defense at a United States Army hospital, and was subject to the Uniform Code of Military Justice. Because her absence was allowed, F's was as well.

V. Order

1. The division's decision not to assess the 2010 dividends of E D and F X is **AFFIRMED**.

2. The division's decision to deny the applications of E D and F X for the 2011 dividends is **AFFIRMED**.

[80] 2 AAC 64.290(e); 15 AAC 05.030(h)

3. The division's decision to deny the applications of E D and F X for the 2012 dividends is **REVERSED**, and those dividends shall be paid.

DATED February 12, 2013. *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 13th day of March, 2013.

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

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