

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

In the Matter of)
)
G D. L (minor))
) OAH No. 15-0635-PFD
2014 Permanent Fund Dividend)

DECISION

I. Introduction

Through his sponsor, high school student G L appeals the denial of his 2014 Permanent Fund Dividend (PFD). G spends the majority of the year in another state, where he is present for the sole purpose of receiving full-time secondary education. The Permanent Fund Dividend Division found his absence unallowable because of technical factors surrounding his living arrangements.

This case went to formal hearing on July 17, 2015. All facts were essentially stipulated, although some details were fleshed out through live testimony at the hearing. The case turns entirely on a legal issue, centering on the interpretation and application of 15 AAC 23.163(d).

This decision concludes that the Division’s interpretation stretches the regulatory language in two key respects. Since no showing was made regarding the regulation’s intent, there is no basis to stretch the language as the Division has proposed. G meets the statutory prerequisites for the allowable absence he has claimed and, on its face, the regulation does not further define the boundaries of that absence category in a way that would render G ineligible.

II. Facts

G L was absent from Alaska for more than 300 days in 2013.¹ With the immaterial exception of a few days, this absence was for the purpose of attending high school year-round in another state.² The question to be answered in this case is whether that absence rendered him ineligible for a PFD the following year.

Except where otherwise noted, the facts set out below are based on the Affidavit of S N (G’s father),³ supplemented by the hearing testimony of both parents. The PFD Division accepted all of these facts.

¹ Ex. 1, p. 3.

² *Id.*

³ The affidavit is at Ex. 8, pp. 3-5.

G L's family maintains a primary residence in one of Alaska's urban centers, where they have owned a 2800-square-foot home for 30 years. S N, the father, and U L, the mother, are an intact family unit, with 33 years of marriage. Mr. N operates a business in Alaska and still works full-time; Ms. L is retired. Both of them began receiving PFDs at the program's inception in 1982, remaining eligible through 2013.⁴ Their son G was born in 1998, receiving PFDs each year beginning the year after he was born.⁵

G is academically gifted. As he neared the end of middle school, the schools in Alaska seemed to be increasingly inadequate to meet his academic needs, particularly in Mandarin Chinese, a language not taught in his city's schools. The family searched the U.S. west coast for suitable schools, and applied to more than one. G was able to gain admission, through a competitive process, to a private secondary school in another state that seemed to be a particularly good fit. Though it was once a boarding school, the school now accepts only day students and requires students attending from far away to live locally with a parent or guardian.

G had no extended family members near the selected school. His parents rented a two-bedroom condominium across from the school.⁶ Ms. L accompanied G and lived in the condominium with him while he attended school, beginning in the ninth grade. It is undisputed that this is a temporary situation, and that Ms. L expects return to living in Alaska when G finishes school. It is also undisputed that the exclusive purpose for her and her son's presence in the out-of-state location is to enable the boy to attend secondary school there. Finally, it is undisputed that Ms. L has retained her Alaska residency while living with her son in another state.⁷

U L was eligible for a PFD in 2013, and she received one. She was not eligible in 2014,⁸ because she was absent from Alaska for more than 180 days during the qualifying year for the purpose of enabling *her son* (not herself) to receive secondary education, which is not one of the allowable absence categories.⁹

⁴ Ex. 2, pp. 3-4.

⁵ Ex. 2, p. 1. Denials of his 2014 and 2015 PFDs are pending.

⁶ Eighteen months later, the landlord decided to put the condominium on the market, and to avoid having to move the family purchased it. It is convenient to the school and a nearby university, but is not a resort or waterfront property.

⁷ Colloquy between ALJ and Robert Pearson at oral argument.

⁸ Ex. 4, p. 1.

⁹ Ex. 4, p. 3.

III. Discussion

The qualifying year for the 2014 dividend was 2013.¹⁰ In order to qualify for a Permanent Fund Dividend in 2014, the applicant had to have been legally a resident of Alaska throughout the year and 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 under the title “Allowable Absences,” AS 43.23.008(a).¹¹

G’s legal residence in Alaska is undisputed; the concern about his eligibility relates only to his physical location. The allowable absence on which G’s eligibility depends is the first one in AS 43.23.008(a), an absence for the purpose¹² of “receiving secondary or postsecondary education on a full-time basis.”

There is no question that G meets the letter and the spirit of this allowable absence category as written by the legislature. His difficulty stems from a department regulation, 15 AAC 23.163(d):

An individual clearly demonstrates that the primary reason for the individual’s absence is to obtain a secondary education by living at a boarding school while attending grades 7 – 12 at an out-of-state institution. An individual who lives with an ineligible parent or ineligible permanent legal guardian while attending an out-of-state institution has not demonstrated that the primary reason for the individual’s absence is to obtain a secondary education.

The Division contends that the second sentence of the quoted provision creates a conclusive presumption that prevents G from receiving a dividend, establishing that he cannot make the showing necessary to bring himself within the secondary education category of allowable absences. Since the Division concedes that, in actuality, G’s primary (and sole) reason for the absence was to obtain a secondary education, this regulation bars G’s application only if it (1) describes G’s living situation and (2) creates an irrefutable presumption.

As to the first issue, one must note that the regulation describes G’s living situation only if it is not interpreted literally. After all, G was living with U L during the qualifying year—2013—and in 2013 U L was eligible for, and received, a PFD. In other words, on the face of it, in 2013 she was not an “ineligible parent.” Neither side addressed this issue at the hearing. The ALJ surmises that the Division would contend that “ineligible parent” does not mean a parent who is actually

¹⁰ AS 43.23.095(5).

¹¹ AS 43.23.005(a)(6).

¹² The “purpose” requirement is not expressly written into the statute, but is implied: one does not qualify for the allowable absence merely because one is attending school out of state—the reason for being out of state must be *in order* to attend school. See, e.g., *In re B.M.*, OAH No. 08-0062-PFD (Comm’r of Revenue 2008). In G’s case, this is not disputed.

ineligible at the time, *i.e.*, during the year the student is living with the parent, but rather a parent who is doing something during that year that will render the parent ineligible the *next* year, such as a parent who is on an unallowable absence. But if that is the intent of the regulation, it is inartfully drafted.

As to the second issue, the Division’s contention that the regulation creates an irrefutable presumption, even in the face of conclusive evidence to the contrary, again stretches the language of the regulation. The regulation does not use the direct language used in other Alaska regulations to create a presumption, rebuttable or otherwise.¹³ Instead, it says that showing that a student is living at a boarding school represents an adequate showing that the primary reason for being out of state is to attend that school, and that showing that a student is living with an ineligible parent is not an adequate showing. It does not address the adequacy of *different* showings, such as the showing made here: an express concession by the PFD Division that the sole purpose of the student’s absence was to obtain secondary education.

The Division’s counterintuitive interpretation of 15 AAC 23.163(d) is not wholly implausible. Regulations, like statutes, are generally to be interpreted according to their intent.¹⁴ Were there a showing in this case that the intent behind 15 AAC 23.163(d) is something other than its apparent literal meaning, it might support application of a presumption of the kind the Division advocates. But no such showing has been attempted in this case.

Against the background of an ambiguous regulation that does not, on its face, appear to exclude someone in G’s position from showing eligibility, together with a direct concession from the Division that G was absent during 2013 for a statutorily allowable reason, the record in this case does not support denial of G’s 2014 PFD.

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¹³ *E.g.*, 15 AAC 160.365 (“Unless the presumption is rebutted by other evidence, . . . an employee is presumed . . .”); 15 AAC 19.1290(2) (“it is presumed that equal time is spend loading and unloading unless the taxpayer provides acceptable evidence . . . which rebuts that presumption”); former 2 AAC 50.745(b) (repealed 2011) (“A presumption established under (a)(4) of this section is conclusive and cannot be rebutted . . .”).

¹⁴ For a discussion of the kind of showing needed to cause a regulation to be read according to intent rather than plain meaning, *see In re Morrison*, OAH No. 08-0471-MED (Alaska State Medical Board 2009), at 6-8 (published at <http://aws.state.ak.us/officeofadminhearings/Documents/MED/MED080471.pdf>).

IV. Conclusion

Because he was absent for an allowable reason during the qualifying year for the 2014 Permanent Fund Dividend, G L is entitled to that dividend. The denial is reversed.

DATED this 30th day of November, 2015.

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 24th day of December, 2015.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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