

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

In the Matter of)	
)	
B L)	OAH No. 15-0946-PFD
)	Agency No. 2015-002-4553
<u>2015 Permanent Fund Dividend</u>)	

DECISION

I. Introduction

B L timely applied for a 2015 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (Division) denied her application, finding that she was out of state for 47 days in addition to an allowable absence for her Fulbright student fellowship in Malaysia. It denied her informal appeal, and Ms. L requested a formal hearing. The hearing was held on August 24, 2015. Ms. L was represented by Barbara Simpson Kraft. Bethany Thorsteinson represented the Division.

The Division’s decision is upheld. Ms. L exceeded the 45 day limit for absences in addition to her Fulbright grant. Her three days of travel to and from Malaysia are appropriately applied to the 45 day limit rather than to her Fulbright allowable absence. As a result, she does not qualify for a 2015 PFD.

II. Facts

There are no material facts in dispute in this case. Ms. L is a lifelong Alaskan. Her status as a legal resident of Alaska has not been contested. The parties agree that, in 2014, Ms. L was absent from Alaska for 352 days. She spent 305 of those days, from January 4 to November 4, as a Fulbright English Teaching Assistant in Malaysia.¹ Ms. L contends that three days of travel to and from Malaysia should count as part of the Fulbright award allowable absence, bringing her Fulbright-related absence days to 308.

The Fulbright Scholarship is an educational program sponsored by the United States Department of State.² In Malaysia, the Fulbright program is administered by the Malaysian-American Commission on Educational Exchange (MACEE).³ The Fulbright Award Authorization letter certifying Ms. L’s selection for a Fulbright award in Malaysia identifies the duration of her grant as “January 4, 2014 - November 4, 2014.”⁴ The Award Authorization also

1 Claimant Ex. H; Div. Position Statement at 2.
2 See Claimant Ex. C.
3 Div. Ex. 8 at 23.
4 *Id.*; see also Div. Ex. 2 at 4; Div. Ex. 4 at 17; Claimant Ex. H at 2.

identifies various Fulbright grant benefits, including paid round trip air travel between the United States and Malaysia, and health and accident insurance.⁵ The Fulbright program paid Ms. L during the 305 days of her teaching grant, and she received travel benefits from the program, but she was not paid for her travel days to and from Malaysia.⁶

Ms. L was not physically present in Alaska in January 2014. She vacationed outside the state and departed for Malaysia from England on January 3, 2014.⁷ After her Fulbright grant work ended on November 4, Ms. L vacationed in Southeast Asia.⁸ She departed from Malaysia on December 17 and arrived in Alaska on December 18, 2014.⁹ Ms. L remained in Alaska for the 13 days from December 19 to December 31, 2014.¹⁰

The Division denied Ms. L's 2015 PFD application, finding that she was absent from Alaska in 2014 for 47 days in addition to her Fulbright grant.¹¹ It relied on the verified dates of the Fulbright award to calculate her allowable absence. By the Division's count, Ms. L's vacation or general absence days included the 3 days from January 1 to January 3, plus 44 days from November 5 through December 18.¹²

Ms. L requested an informal hearing.¹³ She argued that three days of travel should count as allowable absence days for participation in her Fulbright award rather than as general absence days subject to the 45 day limit. This includes one day of travel from England to Malaysia on January 3, and two days of travel from Malaysia to Alaska on December 17-18. Under this rationale, Ms. L had 308 days of allowable absence for her Fulbright award and 44 vacation days.

The Division denied Ms. L's informal appeal.¹⁴ Ms. L requested a formal hearing.¹⁵

5 Div. Ex. 8 at 23.

6 See Claimant's Brief in Support of Appeal at 16; Div. Ex. 8 at 3.

7 See Div. Ex. 8 at 16-18; Div. Ex. 4 at 3-5.

8 Div. Ex. 8 at 9.

9 Claimant Ex. E at 10; Claimant Ex. I at 1. Ms. L departed Malaysia at 11:59 p.m. on December 17 and arrived in Alaska around 5:35 p.m. on December 18. She indicated that her return involved 35 hours of travel. This includes an extended layover in South Korea. See Div. Ex. 8 at 7; Claimant Ex. E at 6, 10.

10 When counting days of presence and absence from Alaska, Division regulations count whole days. With exceptions not relevant here, the day an individual returns to Alaska is counted as a day of absence. 15 AAC 23.173(j). Ms. L's 13 days of presence in Alaska began on December 19, 2014.

11 Div. Ex. 3 at 1. The Division initially calculated Ms. L's Fulbright allowable absence as 304 days. It later recalculated and agreed that her grant totaled 305 days. This change also adjusted her total days of absence from 351 to 352. Div. Position Statement at 2.

12 See Div. Ex. 3; Div. Position Statement at 2.

13 Div. Ex. 4.

14 Div. Ex. 7.

15 Div. Ex. 8.

III. Discussion

Calendar year 2014 is the qualifying year for the 2015 permanent fund dividend.¹⁶ In order to qualify for a PFD, the applicant must have been physically present in Alaska at all times during the qualifying year or, if absent, must have been absent only for one of the 17 allowable reasons listed in a section entitled “Allowable Absences” at Alaska Statute 43.23.008.¹⁷ Subsection (a)(16) of AS 43.23.008 states that an otherwise eligible individual does not lose PFD eligibility if the individual was absent from Alaska “participating for educational purposes in a student fellowship sponsored by the United States Department of Education or by the United States Department of State.”¹⁸ When an applicant claims an allowable absence under this subsection, however, he or she cannot be absent from Alaska for more than 45 days in addition to the days of his or her allowable absence.¹⁹

The issue in this appeal requires interpretation of AS 43.23.008(a)(16) to determine whether travel days to and from a Fulbright award location count as days “participating for educational purposes in a student fellowship” sponsored by the U. S. Department of State. The parties agree that a Fulbright award is a student fellowship sponsored by the U.S. Department of State, and Ms. L’s 305 days as a teaching assistant satisfy this provision.

As the applicant for a 2015 PFD and the party requesting a formal administrative hearing, Ms. L bears the burden of proving her eligibility.²⁰

Travel days to and from Malaysia do not count as allowable absence days under Alaska Statute 43.23.008(a)(16).

The Division concluded that travel days are not days an individual is “participating for educational purposes” in his or her student fellowship. It based this result on the plain language of the statute. It also looked to its treatment of travel days for other allowable absences under AS 43.23.008(a), and it determined that its reading of subsection (a)(16) is consistent with its handling of travel under other, similar subsections.²¹ Ms. L argues that, in adopting subsection (a)(16), the Legislature intended to retain PFD eligibility for Alaskan Fulbright grantees, and this intent should be interpreted as including travel days.

16 AS 43.23.095(6).

17 AS 43.23.005(a)(6).

18 AS 43.23.008(a)(16).

19 AS 43.23.008(a)(17)(C).

20 15 AAC 05.030(h).

21 See Div. Ex. 8 at 38; *In re R.K.*, OAH No. 10-0541-PFD (Commissioner of Revenue 2011). Office of Administrative Hearings decisions may be found online at <http://doa.alaska.gov/oah/Decisions/>.

1. Statutory language and intent

On its face, AS 43.23.008(a)(16) does not explicitly address travel days. Its “participating for educational purposes” language provides the Division with some discretion as to whether a reasonable amount of travel time should be included as part of the allowable absence, and the legislative history of the statute does not compel a different conclusion.

Ms. L is correct that, in adopting AS 43.23.008(a)(16), the Legislature clearly intended to rectify the situation in which former Fulbright grantees had been denied PFD eligibility because they did not satisfy any of the then-existing allowable absence provisions. This occurred because grantees often participated in programs at foreign universities, and some taught or performed research, but they did not necessarily enroll in classes as full-time students. As a result, their absences did not satisfy the terms of AS 43.23.008(a)(1) or (a)(2).²²

However, the subsection’s legislative history provides no indication that the Legislature specifically considered the treatment of travel days. The intent of the new subsection was to overcome the automatic ineligibility problem that had arisen when other Fulbright scholars had applied for the PFD. The Division’s decision in this case does not run afoul of the legislative history or the intent underlying AS 43.23.008(a)(16).

Ms. L also argues that, because subsection (a)(16) is the only allowable absence provision that uses the verb “participating,” while other subsections use words such as “receiving,” “serving,” “providing,” or “because of” Olympic training or competing, this evinces a legislative intent to treat this subsection differently from others. Therefore, cases excluding travel time under other subsections are not a useful guide in this situation.

There is no evidence that the “participating for educational purposes” language of subsection (a)(16) was intended to be read more expansively than other provisions of AS 43.23.008(a). The language and legislative history of AS 43.23.008(a) suggest that various subsections use different introductory words because the context of each allowable absence requires it. For example, the verb “participating” in subsection (a)(16) was intended to be inclusive of the different types of fellowships available within the Fulbright program. It is significant, however, that the Legislature added the limiting words “for educational purposes” to

22 See Minutes, House State Affairs Comm. Hearing on HB 284-PFD, 25th Leg., 2nd Sess. (January 24, 2008) (testimony of former Fulbright scholar that many Fulbright grantees perform research and are not officially affiliated with a university); Minutes, Sen. Health, Educ. and Soc. Serv. Standing Comm. Hearing on HB 284-PFD, 25th Leg., 2nd Sess. (March 26, 2008) (Fulbright grantee is allowed to sit in a seat at a foreign university and participate fully, but did not have to enroll); Minutes, House Fin. Comm. Hearing on HB 284, 25th Leg., 2nd Sess. (January 30, 2008) (Fulbright scholars may lecture or conduct research in a wide variety of fields).

this subsection. In doing so, it indicated an intent to narrow the scope of this allowable absence. It is not sufficient that an individual is “participating” in activities related to a Fulbright grant to receive allowable absence credit. He or she must be “participating for educational purposes” in the fellowship itself.

The Division’s decision not to recognize travel days under AS 43.23.008(a)(16) is consistent with the language and intent of the statute.²³ The Division appropriately concluded that travel is necessary in preparation for, or subsequent to, participation in a Fulbright grant. However, the travel itself is not part of participation in the student fellowship.

2. Consistency with interpretation of travel under other subsections of AS 43.23.008(a)

The Division’s view of this case was influenced by its effort to treat travel days as consistently as possible. This applies both to consistency within the class of applicants relying on subsection (a)(16), as well as between the different subsections of the statute.

According to the Division’s review of its records for calendar years 2013 and 2014, the Division did not count travel days as allowable absences for any applications that relied on subsection (a)(16). It instead relied on the verified fellowship dates provided in official award documentation, as it did in this case.²⁴

The treatment of travel days in cases involving other allowable absences is not binding precedent in this case. However, this inquiry can offer useful guidance, and it is necessary in order to satisfy the general rule of statutory construction requiring that subsections of a statute should be construed consistently.²⁵ Under AS 43.23.008(a)(1), regarding allowable absences for students “receiving secondary or postsecondary education on a full-time basis,” travel days do not count toward the allowable absence.²⁶ Travel time also is not allowable under AS 43.23.008(a)(10) for individuals “serving on the staff” of a member of Alaska’s congressional delegation.²⁷

Travel time is necessarily involved for all of the allowable absences recognized by the statute. Therefore, the fact that significant travel is required for participation in a Fulbright grant

23 *Cf. Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 732 (Alaska 1995) (upholding allowable absence regulation as consistent with statutory language and purpose, even if more restrictive than statutorily required); *State, Dep’t of Revenue v. Bradley*, 896 P.2d 237 (Alaska 1995) (upholding regulation requiring full-time student status despite less restrictive statutory language).

24 Div. Supplemental Position Statement at 2; Testimony of Bethany Thorsteinson.

25 *In re R.K.*, OAH No. 10-0541-PFD (Commissioner of Revenue 2011) at 4.

26 *In re M.L.*, OAH No. 05-0818-PFD (Commissioner of Revenue 2006). This decision is not available online. A copy may be requested from OAH.

27 *In re R.K.*, OAH No. 10-0541-PFD (Commissioner of Revenue 2011) at 4.

does not meaningfully distinguish this case from others.²⁸ The most significant difference between the travel involved in this case and that involved in other scenarios is that the Fulbright program offers paid air travel to and from its grant locations. To take advantage of the paid travel benefit, grantees must abide by various requirements the Fulbright program imposes on travel, including date restrictions and the use of certain airlines.²⁹

The Division correctly concluded that these benefits are distinct from the actual Fulbright grant term, and they do not require a departure from its interpretation excluding travel days. That is, these benefits do not transform travel days into days spent “participating for educational purposes” in the student fellowship itself. Therefore, the Division properly characterized the travel day to Malaysia as a day of preparation for participation in Ms. L’s Fulbright award. Similarly, the return trip to Alaska was a necessary post-grant activity, but it was not a part of Ms. L’s participation for educational purposes in the Fulbright grant. The significant time gap between the end of Ms. L’s Fulbright and her return to Alaska further supports this conclusion.

Alaskan students enroll in educational programs throughout the United States and all over the world. As with the Fulbright award, the travel required to attend these programs falls along a spectrum. As a general proposition, the travel necessary to reach a Fulbright award location is more extensive than that required for most out-of-state students.³⁰ This fact does not necessitate a different outcome, however. Absent an expression of legislative intent to treat travel as participation for educational purposes in a student fellowship, the Division correctly concluded that travel time is subject to the general absence provisions of AS 43.23.008(a)(17).

This result does not implicitly read into AS 43.23.008(a)(16) a new requirement that Fulbright grantees must be “physically present in the grant location” before they receive allowable absence credit, as Ms. L contends. The Division has not questioned whether Ms. L was physically present at her assignment location for each of the 305 days between January 4 and November 4, 2014. The Division’s decision only recognizes that Ms. L did not begin her Fulbright grant until the first day of her fellowship in Malaysia. As a result, this situation is readily distinguished from *In re B.J.L.*, where the Division had implicitly added a new

28 See, e.g., *In re M.L.*, OAH No. 05-0818-PFD (travel necessary to attend out-of-state school); *In re R.K.*, OAH No. 10-0541-PFD (travel necessary to serve on senator’s staff).

29 Affidavit of B L at 2; Testimony of B L.

30 But see *In re M.L.*, OAH No. 05-0818-PFD (Commissioner of Revenue 2006) (applicant sought allowable absence credit for traveling by car to and from his Minnesota university).

requirement to a very narrow rule allowing individuals to retain PFD eligibility despite registering to vote in another state.³¹

The Division's reliance on the official dates of the Fulbright award also means that Ms. L benefits from a presumption that she was "participating for educational purposes" in her fellowship every day between January 4 and November 4, including during school breaks and vacation days. She therefore benefits from the same presumption accorded to out-of-state Alaskan students under subsections (a)(1) and (a)(2), who also are credited with "receiving . . . education on a full-time basis" during intersession breaks and school holidays.³² Excluding travel days to and from a fellowship location does not disadvantage Fulbright grantees relative to individuals receiving allowable absences under other education-related subsections of the statute.

3. Fulbright program treatment of travel days

The Division indicated a willingness to accept three travel days as part of Ms. L's allowable absence if the Fulbright program itself clarified that it considers travel days to and from its grant locations to be part of a Fulbright grant term. Without such evidence, the Division would rely on the verified dates of the grant.

Ms. L points to language in the *Fulbright Malaysia English Teaching Assistant Program Pre-Departure Handbook* to argue that MACEE and the Fulbright program consider travel time to be part of a grantee's participation in a Fulbright award. In a section outlining the accident and sickness insurance coverage that is provided to teaching assistants in Malaysia, the handbook states that the insurance is valid only during "the term of the grant, that is, from the date of departure from home, during direct travel to the place of assignment, during participation in grant activities, and en route home by a direct route."³³

This limited description of the program's accident and sickness insurance coverage does not persuasively establish that the U.S. Department of State, the Fulbright program or MACEE consider travel days to be part of the term of a Fulbright grant, however. As between the two sources of information, the grant term set out in the Award Authorization itself is more specific and more reliable. This conclusion is further supported by the fact that two individuals within the Fulbright program were asked, but declined to state that the program considers travel time to be part of a recipient's participation in a Fulbright grant. Ms. L submitted two letters from

31 OAH No. 13-1807-PFD (Commissioner of Revenue 2014).

32 See, e.g., *In Re J.D.C.*, OAH No. 09-0122-PFD at 2-3 (Commissioner of Revenue 2009); *In Re D.P.H.*, OAH No. 08-0060-PFD (Commissioner of Revenue 2008).

33 Claimant Ex. L at 51.

MACEE’s Fulbright English Teaching Assistantship Program Coordinator, who indicated only that Ms. L was required to be in Malaysia for her grant duties from January 4 to November 4, 2014, and the Fulbright commission made her travel arrangements “to ensure that she would be able to participate in the program for the required grant term.”³⁴

A Senior Program Officer in the Fulbright program’s East Asia-Pacific U.S. Student Programs Division indicated that “the official grant dates for B L’s Fulbright Fellowship to Malaysia were from January 4, [2]014 to November 4, 2014.”³⁵ In response to the Division’s follow-up question whether the program considers travel time to be “participating for educational purposes” in a Fulbright award, the officer replied: “Since Ms. L was en route to Malaysia on January 3 that could be considered as part of her grant – we don’t make the distinction at that level. But based on our available records the grant ended on November 4, 2014, not in December.”³⁶

The evidence supports the conclusion that the Division is interpreting the term of Ms. L’s Fulbright award consistently with the approach used by the Fulbright program. Its reliance on the fellowship dates specified in official award documentation is both reasonable and appropriate. A single reference to a broader definition of the term of a Fulbright grant, found deep within the Fulbright Malaysia pre-departure handbook, does not obligate the Division to adopt that view.³⁷

This outcome offers a bright-line rule that is easy to apply both for applicants and the Division.³⁸ It avoids unduly burdening the Division with a need to determine whether an applicant’s travel time was reasonably direct and efficient, or whether circumstances like long layovers, indirect routing, weather, or mechanical delays resulted in unnecessarily long travel time. It avoids uncertainties about how travel time is to be calculated in cases involving multiple times zones and movement back and forth across the international date line. And, it eliminates

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34 Div Ex. 8 at 5 (letter from K H); *see also* Div. Ex. 8 at 19 (K H letter stating that Ms. L’s Fulbright grant period was January 4 to November 4, 2014, and she traveled on January 3 in order to arrive in time for her duties in Malaysia).

35 Div. Ex. 9 at 2 (email from K B).

36 *Id.* at 1.

37 *See* Claimant Ex. L at 51 of 57.

38 *See Ross v. State, Dep’t of Revenue*, 286 P.3d 495 (Alaska 2012) (easing PFD administrative burden is a legitimate consideration); *see also Bradley*, 896 P.2d at 240.

the need to investigate the individual insurance or other policies that may apply in different Fulbright grant locations.³⁹

IV. Conclusion

The Division properly concluded that Ms. L's travel days to and from her grant location in Malaysia do not qualify as days she was "participating for educational purposes" in her Fulbright fellowship. This means that, in 2014, Ms. L was absent from Alaska for 47 days in addition to the allowable absence for her Fulbright award. Accordingly, the Division's decision to deny her application for a 2015 Permanent Fund Dividend is AFFIRMED. Ms. L has not lost her Alaska residency, and nothing in this decision precludes her from eligibility for future PFDs.

DATED this 18th day of September, 2015.

By: Signed
Kathryn A. Swiderski
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 October, 2015.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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

³⁹ For instance, in this case, it is not clear whether the health and accident coverage Ms. L references applied to her outbound and return travel. On January 3rd, she did not travel to Malaysia from Alaska by a direct route. Her December travel occurred 43 days after the grant ended, which may raise other coverage questions.