

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

|  |   |                          |
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| In the Matter of                       | ) |                          |
|  | ) |                          |
| D E                                    | ) | OAH No. 15-1414-PFD      |
| <hr style="width:45%; margin-left:0"/> | ) | Agency No. 2015-020-2320 |

**DECISION AND ORDER**

**I. Introduction**

D E applied for a 2015 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division denied the application on the basis that Mr. E was absent from Alaska for more than 180 days in the qualifying year, and his absences did not fit any of the categories under which absences are allowed. Mr. E appealed. After a full hearing and based on the evidence in the record, the Division’s decision is affirmed. Mr. E’s extended absence from Alaska to play in a pre-college hockey league, no matter how sensible and well-thought-out a life choice for him, is not an allowable absence under the PFD regulations. Accordingly, he is not eligible to receive a 2015 PFD.

**II. Facts<sup>1</sup>**

D E, a lifelong Alaskan, is currently a first-year college student studying engineering at the No Name School of Engineering. He is also a student-athlete in the NNSOE hockey program.<sup>2</sup>

Following his graduation from high school in 2013, Mr. E had two goals: to study engineering, and to play college hockey.<sup>3</sup> However, Mr. E determined that it would not be possible to gain entry onto a college hockey team without first playing in a Junior Hockey league.<sup>4</sup> Based on Mr. E’s experience and the information his family received from college hockey programs, such programs are unwilling to take on incoming players who lack Junior

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<sup>1</sup> Where not otherwise indicated, the facts presented come from Mr. E’s testimony.

<sup>2</sup> Ex. 8, pp. 3-4.

<sup>3</sup> Ex. 8, p. 3.

<sup>4</sup> Ex. 8, p. 3. Junior Hockey is a competitive level of pre-professional/pre-college hockey, with most players aged 18-21. Ex. 8, p. 7. Playing in a Tier III Junior Hockey program, the level at which Mr. E was eligible to play, either enables players to then move up in to the more competitive Tier II, or, as in Mr. E’s case, “serves as a platform for players to be seen and scouted and hopefully play in the NCAA, most typically at the Division III [level], or in the American Collegiate Hockey Association (ACHA) club college hockey level.” Ex. 8, p. 7.

Hockey experience.<sup>5</sup> Mr. E concluded that, in order to join a college hockey program, he needed to defer his college entrance until he had accumulated the requisite playing time in a Junior Hockey league. Accordingly, even Mr. E had been offered an academic scholarship to Colorado State University, he decided to forego that opportunity so that he could also play college hockey, even though it meant waiting two years to start college.<sup>6</sup>

Alaska has two “highly competitive” Tier II Junior Hockey programs, but currently has neither a Tier I nor a Tier III program – the level at which Mr. E was competitive.<sup>7</sup> Because Alaska has no Tier III Junior Hockey, Mr. E had to leave Alaska to participate in such a program.<sup>8</sup> According to the President of the Alaska State Hockey Association, “most all [Alaskan] Junior Hockey level players seeking to advance to play in college must necessarily leave Alaska to find a Junior Hockey home elsewhere until they can be picked up to play in college.”<sup>9</sup> Based on the lack of opportunities for such players within Alaska, such players “must leave Alaska to pursue their aspirations of playing at that higher level to allow them to advance to college hockey.”<sup>10</sup>

Mr. E was able to secure a place on a Tier III Junior Hockey team beginning in the fall of 2013.<sup>11</sup> He played Junior Hockey for most of 2014 and the first half of 2015, returning to Alaska both summers for work. He enrolled as a college freshman in fall 2015.<sup>12</sup>

On January 25, 2015, Mr. E submitted an online application for the 2015 PFD.<sup>13</sup> Mr. E’s application indicated he had been absent from Alaska for 277 days during 2014.<sup>14</sup> For an absence between January 4, 2014 and June 4, 2014 (151 days), Mr. E explained that he was out of state “participating in No Name States Hockey League, Tier III, Junior A Hockey Program in No Name.” For an absence between August 17, 2014 and December 21, 2014

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<sup>5</sup> Testimony of Mr. E; Ex. 8, pp. 3-4; Ex. 12, p. 1.

<sup>6</sup> Ex. 9, pp. 2-4; Testimony of Mr. E.

<sup>7</sup> Ex. 8, p. 8.

<sup>8</sup> Ex. 8, p. 8; Testimony of Mr. E.

<sup>9</sup> Ex. 8, p. 8.

<sup>10</sup> Ex. 8, p. 8.

<sup>11</sup> Ex. 8, p. 3; Testimony of Mr. E.

<sup>12</sup> Ex. 8, p. 3; Testimony of Mr. E.

<sup>13</sup> Ex. 1. Mr. E had received a PFD for every year between 1995 and 2014. Ex. 1, p. 5.

<sup>14</sup> Ex. 1, p. 4.

(126 days), Mr. E indicated he was “participating in No Name Junior Hockey League, Tier III, Junior A Hockey Program in No Name.”<sup>15</sup>

The PFD division denied Mr. E’s 2015 PFD application on June 12, 2015. The notice of denial explained that the absence to play Junior League hockey was not an allowable absence under the PFD statute or regulations.<sup>16</sup>

Mr. E timely requested an informal appeal.<sup>17</sup> The appeal noted that he had been “home 92 days in No Name, Alaska” during the qualifying year, and that his absences were “solely for the purpose of participating in Junior A Hockey as an avenue to college recruitment.”<sup>18</sup> In identifying “other relevant facts,” Mr. E noted he had not sought permanent employment in either location, and had “remained an Alaska resident for all other purposes: medical insurance, driver’s license, cell phone, permanent address, parent’s dependent, and employment.”<sup>19</sup> In addressing “other considerations,” Mr. E admitted that his absence did not fall squarely under any allowable absence category, but, noting his intent to remain a resident and that the length of his absence was “out of [his] control,” he “request[ed] a waiver of the regulation” in order to receive a PFD.<sup>20</sup>

The Division denied Mr. E’s appeal on the basis that participation in the Junior Hockey program was not an allowable absence.<sup>21</sup> Mr. E requested a formal hearing.<sup>22</sup>

A hearing was held on November 30, 2015. Mr. E participated by phone from No Name, representing himself ably and testifying in support of his appeal. Mr. E’s mother and power of attorney, L E, also participated by phone. Pete Scott represented the Division. All exhibits offered by the parties were admitted, and the record closed at the end of the hearing.

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<sup>15</sup> Ex. 1, p. 4. At the formal appeal stage, Mr. E later slightly adjusted the dates of his reported absence to reflect a 148-day absence and a 124-day absence, respectively. Ex. 8, p. 2. These changes are immaterial to the conclusion that his absence over considerably more than 180 days is not allowable under the PFD program rules.

<sup>16</sup> Ex. 3, p. 1.

<sup>17</sup> Ex. 5.

<sup>18</sup> Ex. 5, p. 2.

<sup>19</sup> Ex. 5, p. 2.

<sup>20</sup> Ex. 5, p. 3.

<sup>21</sup> Ex. 6.

<sup>22</sup> Ex. 8.

### III. Discussion

In order to be eligible to receive a PFD in 2015, Mr. E had to have been physically present in Alaska all through the qualifying year (2014), or absent only for one of the allowable reasons provided in the statutes and regulations governing the PFD.<sup>23</sup>

“Regardless of whether the absences were for good reasons, unless the absences fall within one of the [16] categories listed in AS 43.23.008(a) as those categories have been defined by regulation,” Mr. E is not eligible to receive a dividend for 2015.<sup>24</sup>

Allowable absences under AS 43.23008(a) include an absence while “receiving secondary or postsecondary education on a full-time basis;”<sup>25</sup> and “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.”<sup>26</sup> In the athletic realm, absences are also allowed for Alaskans “because of training or competing as a member of the United States Olympic Team or a United States national team for an Olympic Sport.”<sup>27</sup>

Mr. E candidly admits that his absence did not fall within the four corners of any of the allowable absence exceptions under AS 43.23.008(a).<sup>28</sup> Mr. E was not enrolled in an educational program at an educational institution; he was playing hockey full-time so that he could later qualify for a college team. While an absence for full-time post-secondary education is specifically allowed, absences to *prepare* for post-secondary education have been disallowed.<sup>29</sup> Similarly, young Alaskans engaged in personally and professionally valuable postsecondary internship or missionary programs have also been denied PFD eligibility where those program did not fit the strict definitions of AS 43.32.008(a) and its

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<sup>23</sup> AS 43.23.005(a)(6).

<sup>24</sup> *In re: J. and D.B.*, OAH No. 05-0282 (Commissioner of Revenue 2006), p. 2. Mr. E’s written arguments at the informal appeal level and with his request for a formal hearing note that he retained his Alaska residency for other purposes, keeping an Alaska driver’s license, not seeking employment outside the State, and returning each summer to work. Ex. 5, p. 3; Ex. 8, p. 3. But the definition of Alaska residency for PFD purposes is more restrictive than residency related to other purposes. *Brodigan v. State of Alaska*, 900 P.2d 728, 733, n. 12 (Alaska 1999). Moreover, and crucial to the determination at issue here, PFD eligibility turns not only on Alaska *residency*, which is not an issue here, but also on physical presence in the State during the qualifying year. Thus, the issue here is not whether Mr. E is considered an Alaska resident, but whether, despite his residency status, he nonetheless had too long a period of absence from the state to be eligible for a 2015 PFD. As to that issue, AS 43.23.008 controls.

<sup>25</sup> AS 43.23008(a)(1).

<sup>26</sup> AS 43.23008(a)(3).

<sup>27</sup> AS 43.23008(a)(15).

<sup>28</sup> Ex. 5, p. 3; Ex. 8, p. 3.

<sup>29</sup> *See, e.g.*, OAH No. 11-0380-PFD (Commissioner of Revenue 2012).

implementing regulations.<sup>30</sup> This is so even though the Legislature carved out allowable absences for certain volunteer activities<sup>31</sup> and certain fellowship programs.<sup>32</sup> Absences for analogous activities not falling within those narrowly defined allowable absence exceptions have consistently been found to be not allowable for purposes of PFD eligibility. Likewise, although the Junior Hockey program has great value in Mr. E's life, was pursued to further his long-term educational goals, and is not available within the state, those features cannot make an unallowable absence into an allowable one.

This has been shown across multiple contexts, including in several cases involving young athletes whose athletic pursuits took them outside of Alaska. Under an earlier version of AS 43.23.008(a), in which the allowable absence category relating to Olympic athletes was limited to members of the Olympic team alone, absences related to membership on U.S. National Teams were deemed to be not allowable under that section. So, a "world-class biathlete" seeking a position on the U.S. Olympic team was unable to claim his time with the U.S. National Biathlon Team as an "allowable absence," even though absences for participation on the Olympic Team itself were allowed.<sup>33</sup> In another case, a young Alaskan who left Alaska to attend a motorcross training program was not eligible to receive a PFD because the program did not meet the definitions of an "educational institution" under AAC 23.163(c)(2).<sup>34</sup>

Fundamentally, Mr. E seeks a "variance" from strict application of the regulations in light of the unavailability of Tier 3 Junior Hockey within Alaska, and the unique necessity, within collegiate hockey, for players to acquire post-secondary, pre-college playing experience.<sup>35</sup> But it is well-established that neither the PFD Division nor the Administrative

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<sup>30</sup> See, e.g., *In re: C.G.*, OAH No. 15-1244-PFD (Commissioner of Revenue, 2015); *In re: T.T.*, OAH Case No. 13-1691-PFD (Commissioner of Revenue 2013); *In re: R.K.*, 10-0541-PFD (Commissioner of Revenue 2010).

<sup>31</sup> AS 43.23.008(a)(14) ("serving as a volunteer in the federal peace corps program").

<sup>32</sup> AS 43.23.008(a)(16) (those "sponsored by the United States Department of Education or by the United States Department of State").

<sup>33</sup> *In re Q.H.*, OAH No. 09-0260-PFD (Commissioner of Revenue 2009). This was so even though, in a situation with some parallels to this one, it was alleged that national team membership was a functional prerequisite to Olympic team membership. *Id.*, at p. 4. ("It may be, as Mr. H. suggests, that an allowable absence for Olympic team members is of little or no practical value to Alaskans whose membership on an Olympic team is but a small portion of the time they spend out of the state training and competing as members of the United States national team during the years prior to the selection of the Olympic team. ... It may be that the legislature was not fully informed regarding the issue and that a more deliberative process would have yielded different legislation. But the law is what it is, not what it might have been.")

<sup>34</sup> *In re: D.X.*, OAH No. 12-0131-PFD (Commissioner of Revenue 2012).

<sup>35</sup> See Ex. 5, p. 3; Ex. 8, p. 3.

Law Judge has the authority “to grant PFDs to people who were absent for reasons, no matter how good, that are not allowable” under AS 43.23.008(a) and its regulations.<sup>36</sup> Mr. E’s absences from Alaska during 2014, no matter how well-justified or even necessary in terms of his long-term academic and athletic goals, do not satisfy any allowable absence criteria under AS 43.23.008(a). Accordingly, he is not eligible for a 2015 PFD.

**IV. Conclusion**

Because Mr. E’s absences from Alaska during 2014 do not fall within any of the enumerated allowable absences under the PFD statute, he is not eligible for the 2015 PFD. The Permanent Fund Dividend Division’s decision to deny Mr. E’s application for a 2015 PFD is therefore AFFIRMED.

Dated: December 7, 2015

*Signed*  
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Cheryl Mandala  
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 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 31<sup>st</sup> 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.]

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<sup>36</sup> See, e.g., *In re: J. and D.B.*, OAH No. 05-0282 (Commissioner of Revenue 2006), p. 2.