

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

In the Matter of	)	
	)	
D C	)	OAH No. 20-0533-PFD
	)	Agency No. 2019-055-3224
<u>2019 Permanent Fund Dividend</u>	)	

**REVISED FINAL DECISION**

**I. Introduction**

Ms. D C timely filed an electronic application for a 2019 Permanent Fund Dividend, disclosing that she had been absent from Alaska a total of 284 days during the 2018 calendar year. The Permanent Fund Dividend Division denied her application on the basis that she was absent from Alaska for over 180 days during the qualifying year while not engaged in one of the special activities for which the PFD statute allows longer absences.

Ms. C timely filed a request for informal appeal. She indicated that large portions of her absence from Alaska during the qualifying year were due to her participation in a GAP year program (“GAP Program”),<sup>1</sup> including conducting an internship, attending seminars and taking Spanish classes, all related to beginning her postsecondary education. Consequently, she suggested that these absences should not negate her eligibility. The Division disagreed. It asserted that per its regulations because Ms. C did not receive college credit for the GAP Program, the absences did not qualify as allowable. Accordingly, the Division upheld its initial denial.

Ms. C timely filed a request for formal hearing. A telephonic hearing occurred on July 27, 2020. Through a limited power of attorney, Ms. C’s mother, K J, participated at the hearing on her behalf. The Division participated through its representative, Mr. Peter Scott. Based on the testimony and evidence offered at the hearing, the Division’s decision denying Ms. C’s 2019 PFD is affirmed.

Following issuance of a proposed decision by the Administrative Law Judge on August 24, 2020, a proposal for action was issued by the Division on September 15, 2020. The Deputy Commissioner remanded the decision after that occurred. A proposed decision after remand was transmitted to the Department of Revenue on September 22, 2020. After further revision, this is

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<sup>1</sup> A “GAP year program is a “[a] semester or year of experiential learning, typically taken after high school and prior to career or post-secondary education, in order to deepen one's practical, professional, and personal awareness.” See <https://gapyearassociation.org/gap-year.php>.

the Department of Revenue's revised final decision.

## II. Facts

The key facts in this case are not in dispute. Ms. C is a long time Alaska resident who has continuously applied for PFDs beginning in 2000.<sup>2</sup> She timely filed an electronic application for a 2019 PFD, indicating that she was absent from Alaska for 284 days during the 2018 qualifying year.<sup>3</sup> Included in those absences were 54 days outside of Alaska on vacations, 107 days while attending the University of San Diego, and 121 days participating in a GAP Program known as the Amigos de las Americas.<sup>4</sup>

In requesting an informal appeal of the Division's denial, Ms. C suggested that all of her time outside Alaska in 2018 should be considered allowable. The main component of this argument was that her participation in the GAP Program was for her professional and educational betterment.<sup>5</sup> The GAP Program is an American Gap Associated accredited educational program.<sup>6</sup> In the program, in City A, Ecuador, Ms. C took Spanish classes, interned with the Cystic Fibrosis Foundation, and participated in seminars and workshops.<sup>7</sup> However, because of the rules of the University of San Diego where Ms. C would ultimately attend, she was not allowed to receive college credit for the Gap Program and still maintain her scholarship.<sup>8</sup> Nevertheless, in her view, if her time outside of Alaska while attending the GAP Program were construed as allowed, she would be within the annual absences from Alaska to remain eligible for a PFD.<sup>9</sup>

The Division again denied Ms. C's informal appeal.<sup>10</sup> It concluded that her 175<sup>11</sup> or 177 days of the absence beyond her time at the university were not allowed. This is because,

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<sup>2</sup> Ex. 1, p. 5.

<sup>3</sup> Exs. 1 and 8.

<sup>4</sup> Ex. 8; Division's Position Statement, dated June 29, 2019, at p. 2.

<sup>5</sup> Ex. 4.

<sup>6</sup> Ex. 4, pp. 2-3.

<sup>7</sup> Ex. 4, p. 2.

<sup>8</sup> Ex. 4, p. 2.

<sup>9</sup> Ex. 4, pp. 2-4.

<sup>10</sup> Ex. 5.

<sup>11</sup> There is a small and inconsequential discrepancy between the days of absence claimed by the Division in its decision of denial of the request for informal appeal and its position statement. In its decision of denial of the request for informal appeal, the Division suggests that Ms. C had 177 days of absence from Alaska in addition to her absence for attending the University of San Diego. *See* Ex. 5. However, in the Division's position statement, it suggests that Ms. C only had 175 days of absence from Alaska in addition to the days she attended the University of San Diego. *See* Division's Position Statement at 2. For consistency purposes, this decision adopts and will use the 175 days of absence as the correct figure.

according to Alaska statutes and regulations governing the PFD program, they were not verified as full-time enrollment and attendance for Post-Secondary Education, and 175 days exceeds the 120 days of absences allowed in addition to those for Post-Secondary Education.<sup>12</sup> Ms. C then timely requested a formal hearing.<sup>13</sup>

In seeking the formal hearing, Ms. C supplied a more detailed explanation for her absences,<sup>14</sup> a letter from the Executive Director of the Amauta Spanish School,<sup>15</sup> details regarding her participation in the GAP Program,<sup>16</sup> and a letter from the program’s Admissions Manager.<sup>17</sup> At the hearing which occurred telephonically on July 27, 2020, Ms. J argued that her daughter’s absence for participation in the GAP Program should be allowed because it was for purposes of her schooling and occurred in an accredited program.<sup>18</sup>

In its position statement submitted in advance of the hearing, the Division provided a table summarizing Ms. C’s time both while in and outside of Alaska in 2018.<sup>19</sup> Other than a few minor, insignificant exceptions, Ms. J has acknowledged the overall accuracy of the table.<sup>20</sup>

**D C Absence Dates-2018**

<b><u>DATES</u></b>	<b><u>In Alaska</u></b>	<b><u>Vacation</u></b>	<b><u>GAP Prog.</u></b>	<b><u>Univ. of San Diego</u></b>
1/1 - 1/22	22 days			
1/23 - 1/23		1 day		
1/24- 5/24			121 days	
5/25-6/9		16 days		
6/10-6/24		15 days		
6/25 - 7/15	21 days			
7/16 - 8/1		17 days		
8/2- 8/30	29 days			
8/31 -9/4		5 days		
9/5 -12/20				107 days
12/21 - 12/31	11 days			
<b>Total= 365 days</b>	<b>83 days</b>	<b>54 days</b>	<b>121 days</b>	<b>107 days<sup>21</sup></b>

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<sup>12</sup> Ex. 5.  
<sup>13</sup> Ex. 7.  
<sup>14</sup> Exs. 6 and 7.  
<sup>15</sup> Ex. 7 at p. 14-15.  
<sup>16</sup> Ex. 7 at p. 16.  
<sup>17</sup> Ex. 9.  
<sup>18</sup> Testimony of Ms. J.  
<sup>19</sup> Division’s Position Statement at p. 2.  
<sup>20</sup> Testimony of Ms. J.  
<sup>21</sup> Division’s Position Statement at p. 2 (citations omitted).

### III. Discussion

The qualifying year for the 2019 dividend was 2018.<sup>22</sup> A PFD applicant must meet several eligibility requirements.<sup>23</sup> One of the eligibility requirements is that a person must have been physically present in Alaska throughout the qualifying year, or only absent for one of the 17 absences allowed by Alaska Statute 43.23.008.<sup>24</sup> Most of the allowable absences in AS 43.23.008 relate to specialized reasons for being out of state, such as serving in the military or serving in Congress.

There are several forms of absence potentially applicable to Ms. C. One 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 circumstance, and if other kinds of absences are claimed as well, it is subject to even more restrictive limits.<sup>25</sup> Since Ms. C was absent for more than 180 days (indeed, she was only present in the state for about 83 days), this allowable absence cannot, *by itself*, preserve her eligibility for the dividend. She needs to additionally qualify for a second type of allowed absence. Two provisions which might conceivably apply on these facts are AS 43.23.008(a)(1), relating to receiving secondary or postsecondary education, and 43.23.008(a)(2), relating to receiving vocational or professional education when a comparable program is not available in the state.<sup>26</sup>

#### A. *Application of AS 43.23.008(a)(1)*

Per AS 43.23.008(a)(1), an allowable absence may occur while a person is “receiving secondary or postsecondary education on a full-time basis.”<sup>27</sup> This absence certainly applied to Ms. C’s 2018 attendance at the University of San Diego for 107 days.<sup>28</sup> However, the full-time education provision does not apply to the 175 days Ms. C was away on vacation or participating in the GAP Program and while not receiving credit at the University of San Diego.

At the hearing, Ms. J attempted to suggest that because the GAP Program is accredited, it should potentially be construed as postsecondary education on a full-time basis, per AS

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<sup>22</sup> AS 43.23.095(6).

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

<sup>24</sup> AS 43.23.005(a)(6).

<sup>25</sup> AS 43.23.008(a)(17)(A).

<sup>26</sup> AS 43.23.008(a).

<sup>27</sup> AS 43.23.008(a)(1).

<sup>28</sup> Ex. 2, p. 2; Ex. 8, p. 1.

43.23.008(a)(1), so that an additional 121 days could be covered by that type of allowable absence.<sup>29</sup> But this argument is unavailing.

Regulations implementing AS 43.23.008(a) specify that such an absence, including any necessary internships, means full-time enrollment and attendance in a program leading to a degree or certificate, or in an internship that is required by the college or university as part of the student's academic program.<sup>30</sup> Here, Ms. C did not receive academic credit for her participation in the GAP Program. Instead, the evidence and testimony reflect that Ms. C could have potentially received such credit but chose not to do so because of rules in place by the University of San Diego. Those rules would have prevented her from receiving a significant scholarship had she sought credit for her participation in the GAP Program.<sup>31</sup> Moreover, the portion of her absence that was an internship with the Cystic Fibrosis Foundation was not required for her university program. Therefore, AS 43.23.008(a)(1), the educational absence, only applies to the 107 days when she was actually studying at the University of San Diego.

***B. Application of AS 43.23.008(a)(17) as an Add-On to AS 43.23.008(a)(1)***

Ms. C had 175 days of absence not covered by the educational provision. This, however, cannot be covered by the open-ended, catchall allowance for vacations and the like that was mentioned above. This is because an allowed educational absence brings with it certain limitations. A person who claims an educational absence *cannot* add onto it the full 180 days of the open-ended allowance. Instead, a person who claims the educational absence can have no more than 120 additional (non-educational) days of absence under the open-ended allowable absences.<sup>32</sup> Because Ms. C had 175 days of absence which were not for secondary or postsecondary education, she clearly exceeded this limitation.

***C. Application of AS 43.23.008(a)(2)***

At the hearing, Ms. J also suggested that AS 43.23.008(a)(2) might apply.<sup>33</sup> That provision provides that, in certain limited circumstances, an individual may maintain PFD eligibility despite an absence if the individual was:

[r]eceiving vocational, professional, or other specific education on a full-time basis, for which, as determined by the Alaska Commission on Postsecondary

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<sup>29</sup> Testimony of Ms. J.

<sup>30</sup> 15 AAC 23.163(c)(1)(B).

<sup>31</sup> Testimony of Ms. J; Ex. 4, p. 2; Ex. 9, p. 1.

<sup>32</sup> AS 43.23.008(a)(17)(B).

<sup>33</sup> Testimony of Ms. J.

Education, a comparable program is not reasonably available in the state.<sup>34</sup>

The Division’s regulations further define this category as follows:

For the purposes of AS 43.23.008(a)(2), receiving vocational, professional, or other specific education on a full-time basis means attending a program for which, as determined by the Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state; the out-of-state program must be at an educational institution eligible to participate in financial aid programs administered by the Alaska Commission on Postsecondary Education.<sup>35</sup>

Ms. J argued that her daughter’s participation in the in the GAP Program was valuable professional and educational development that could not have been received in Alaska.<sup>36</sup> As a threshold matter, however, even if the Gap Program can be viewed as providing participants with valuable professional development and educational experience, that does not make the program an allowable absence under AS 43.23.008(a)(2) and its implementing regulations.

To qualify for an allowable absence under the regulation, “[t]he [professional] education must be at an educational institution.”<sup>37</sup> This is because both the statute and the regulation specifically define the type of qualifying educational opportunities in terms of those programs for which the Alaska Commission on Post-Secondary Education (“ACPE”) might identify a comparable program within Alaska. As a prior Commissioner of Revenue decision has held:

It would make little sense to read 15 AAC 23.163(c)(2) as providing an allowance for attending a program in another state at other than an educational institution, when the regulation provides that a precondition for availability of the allowable absence is that no educational institution in Alaska offers a comparable program.<sup>38</sup>

Thus, in *In re: T.T.*, participation in the “Disney College Program Internship” – which pairs three hours per week of coursework with a full-time internship experience -- was not deemed to be an allowable absence under (a)(2).<sup>39</sup> The regulations implementing

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<sup>34</sup> AS 43.23.008 (a)(2).

<sup>35</sup> 15 AAC.23.163(c)(2).

<sup>36</sup> Testimony of Ms. J.

<sup>37</sup> *In re: D.X.*, OAH Case No. 12-0131-PFD (Commissioner of Revenue 2012).

<sup>38</sup> *In re: R.K.*, OAH Case No. 10-0541-PFD (Commissioner of Revenue 2011).

<sup>39</sup> *In re: T.T.*, OAH Case No. 13-1691-PFD (Commissioner of Revenue 2013). This outcome may be contrasted with the outcome in *In re: D.E.*, in which an absence for study at the John Jay Institute was deemed eligible. Students in that program, the decision notes, are “full-time students in a traditional

(a)(2) specifically require a full-time educational experience, and “[t]he fact that a job provides excellent experience and teaches a person a great deal does not turn it into ‘education.’”<sup>40</sup> Rather:

Ms. T’s situation is similar to that of many other Alaskans who have left the State for temporary job experiences, such as AmeriCorps, that help them grow as professionals or future professionals; in general, these individuals retain their Alaska residency but are not able to retain PFD eligibility while they are away.<sup>41</sup>

Nor was an allowable absence available in *In re: R.K.* for a fellowship with the American Civil Liberties Union.<sup>42</sup> Because the ACLU “is not an educational institution,” the fellowship program, no matter how meaningful or valuable to its participants, does not provide an allowable absence under (a)(2).

At the hearing, Ms. J placed significant emphasis on the benefits of the GAP Program.<sup>43</sup> However, as previous decisions have explained, the Division is required to follow the narrow confines of the allowable absence categories, and does not have discretion to allow an absence that does not fit squarely within one of the specified categories, no matter how worthy the reason for that absence:

Each year, people leave Alaska for reasons like volunteering in other states and countries, performing church missions, taking advantage of unique business opportunities, high-level sports competitions[,] caring for sick or dying friends, or caring for the children of friends with health or other problems. All of these may be good reasons to leave Alaska, but under the law, if the total absences exceed 180 days in the qualifying year, the person will not be eligible for a dividend in the next year, regardless of how laudable the reason for the absence.<sup>44</sup>

Here, it is unnecessary to determine whether the particular GAP Program at issue is or is not an “educational institution” for purposes of AS 43.23.008(a)(2) and 15 AAC.23.163(c)(2). This is because the regulation defining this category of absence imposes several requirements. One of these requirements is that the applicant must show that her attendance was for vocational, professional or other specific education.<sup>45</sup> Here, there was no evidence

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academic classroom setting.” *In re: D.E.*, 11-0393-PFD (Commissioner of Revenue 2011).

<sup>40</sup> *Id.*, p. 3.

<sup>41</sup> *Id.*, p. 3.

<sup>42</sup> *In re: R.K.*, 10-0541-PFD (Commissioner of Revenue 2010).

<sup>43</sup> Testimony of Ms. J.

<sup>44</sup> *In re: J. and D.B.*, OAH No. 05-0282 (Commissioner of Revenue 2006), p. 2.

<sup>45</sup> 15 AAC 23.163(c)(2).

demonstrating that the GAP Program was for vocational, professional or other specific education. While it may be argued that Ms. C's participation in the GAP Program is tantamount to receiving "vocational, professional, or other specific education on a full-time basis," such an argument is unavailing. In this instance, it is not as if Ms. C is already engaged in a profession in which fluency in Spanish or Spanish immersion may be helpful or appropriate. Instead, at the time in question, Ms. C was a 19-year old high-school graduate entering into the GAP Program.<sup>46</sup> She did not have a profession. One cannot embark on a program of "continuing" professional education before one's profession has even begun.

More fundamentally, a 19-year-old's participation in a GAP Program does not create either a profession or a vocation. A prospective college student who takes advantage of a wonderful opportunity to learn Spanish, attend classes, participate in seminars and Spanish immersion, and gain experience as an intern, does not thereby become entitled to claim all future education as either a vocation or professional development. Ms. C's GAP Program may have been excellent preparation for a future vocation or profession, but it did not bring her to the point where her education could plausibly be characterized as vocational or professional development or education. That is still in the future.

Finally, neither the PFD Division nor the administrative law judge has the legal 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>47</sup> Ms. C is to be commended for choosing to further her professional and educational development by participating in the GAP Program and volunteering for the Cystic Fibrosis Foundation. The merit of her choices, however, does not entitle her to a dividend in this case. Consequently, the 175 days she spent outside of Alaska for both vacation and participation in the GAP Program cannot be considered as an allowable absence for PFD purposes.

#### **IV. Conclusion**

During the qualifying calendar year for her 2019 PFD, Ms. C spent 282 days outside of Alaska. This time away included 121 days participating in a GAP Program internship, 54 days on vacation, and 107 days attending school at the University of San Diego. While Ms. C's participation in the GAP Program may have benefitted her a great deal, unfortunately, it

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<sup>46</sup> Ex. 1, p. 1; Ex. 4, pp. 1-4.

<sup>47</sup> See, e.g., *In re: J. and D.B.*, OAH No. 05-0282 (Commissioner of Revenue 2006), p. 2.



combined with the out-of-state vacation resulted in her being away from the state in excess of the period required to remain eligible for a 2019 PFD. Accordingly, the Division's decision denying Ms. C's 2019 PFD is AFFIRMED.

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 5<sup>th</sup> day of November, 2020.

By: *Signed*  
Mike Barnhill, Deputy Commissioner  
Alaska Department of Revenue

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