

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

In the Matter of	)	
	)	
T F, JR.	)	
	)	OAH No. 20-0654-PFD
<u>2019 Permanent Fund Dividend</u>	)	Agency No. 2019-010-8738

**FINAL DECISION**

**I. Introduction**

Mr. T F, Jr., timely filed an electronic application for a 2019 Permanent Fund Dividend (PFD), disclosing that he was absent from Alaska a total of 203 days during the 2018 calendar year. His absences were to attend school outside Alaska to become a merchant mariner and having gone to sea while serving on a vessel as part of his academic apprenticeship.

The PFD Division (Division) initially denied Mr. F’ application on the basis that he was absent from Alaska for more time than allowed during the qualifying year and while not engaged in one of the special activities for which the PFD statute allows longer absences. Although Mr. F informally appealed the denial, the Division did not receive his informal appeal request until 113 days after the deadline. It denied the request because it was untimely, and also because he was inexcusably absent from Alaska longer than allowed during the qualifying year. Mr. F subsequently filed a formal hearing request.

Before the hearing, the Division filed a motion to dismiss Mr. F’ appeal on the basis that it was untimely. A telephonic hearing occurred on August 31, 2020. Participating at the hearing were both Mr. F and the Division, represented by Peter Scott. For the reasons set forth below, the Division’s motion to dismiss the appeal due to untimeliness is denied. However, the Division’s denial of Mr. F’ 2019 PFD application is affirmed because, under the circumstances, Mr. F exceeded the absences allowed during the qualifying year.

**II. Facts**

Mr. F began being eligible to receive PFDs in 2003.<sup>1</sup> Following an apparent absence from Alaska beginning in approximately 2008/2009, he re-established residency in June 2015 and began PFD eligibility once again in 2017.<sup>2</sup> In 2018, Mr. F embarked on a career in the merchant marine industry by enrolling in the Seafarers School of Seamanship (“Seafarers

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<sup>1</sup> Div. Ex. 1, p. 6.  
<sup>2</sup> Div. Ex. 1, p. 6; Div. Ex. 10.

School”) in City B, State A.<sup>3</sup>

On his 2019 PFD web application, Mr. F confirmed that he was outside of Alaska at the time of his application and was also absent from Alaska a total of 203 days during the 2018 qualifying year.<sup>4</sup> He indicated that 108 of the days outside of Alaska in 2018 were while attending the Seafarers School in State A and 95 days were while onboard a merchant marine vessel as part of an academic apprenticeship program associated with the School.<sup>5</sup> In his web application, Mr. F also confirmed that he was continuing to maintain his Alaska residency and listed his physical and mailing address as City B, Alaska.<sup>6</sup>

Mr. F’s application was denied because, among other things: 1) he was absent from Alaska for 203 days during the qualifying year; 2) the Seafarers School is not an accredited school meeting the allowable education absence requirements; and 3) he was absent for more than 45 days in addition to the absence allowed as a merchant mariner.<sup>7</sup> The denial letter specified that for the denial to be reversed, within 30 days, the Division must be provided a request for informal appeal and “[p]roof that T was not absent from Alaska for more than 45 days during 2018 in addition to any allowable absence(s).”<sup>8</sup>

Mr. F appealed, but his informal appeal request did not reach the Division until 113 days after the deadline.<sup>9</sup> In his request, Mr. F indicated that the Seafarers School is an accredited school meeting the requirements for an allowable absence and that he was at sea during the time that the informal appeal deadline expired.<sup>10</sup> In response, the Division denied the informal appeal request because it was untimely and because he was absent from Alaska in 2018 for 45 days beyond the allowable absence as a merchant mariner.<sup>11</sup>

Mr. F then requested a formal hearing.<sup>12</sup> In doing so, he supplied a more detailed explanation for his absences, certificates of completion in becoming a merchant mariner, a copy of an Alaska Airlines boarding pass for his return to Alaska on August 27, 2019, a certificate of completion of his apprenticeship, a certificate of achievement for completion of his curriculum,

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

<sup>4</sup> Div. Ex. 1, pp. 1, 5.

<sup>5</sup> Div. Ex. 1, p. 5; Ex. 3, p. 5; Testimony of Mr. F.

<sup>6</sup> Div. Ex. 1, p. 1.

<sup>7</sup> Div. Ex. 4, p. 1.

<sup>8</sup> Div. Ex. 4, p. 1.

<sup>9</sup> Div. Ex. 5, p. 1.

<sup>10</sup> Div. Ex. 5, p. 1.

<sup>11</sup> Div. Ex. 6, p. 1.

<sup>12</sup> Div. Ex. 8.

information from the Alaska Department of Labor concerning Alaska’s maritime workforce, and copies of correspondence sent to the Division.<sup>13</sup>

Prior to the hearing, the Division moved to dismiss Mr. F’ appeal on the basis that the informal hearing request was untimely.<sup>14</sup> A telephonic hearing occurred on August 31, 2020, and both Mr. F and the Division, represented by Mr. Scott, participated at the hearing. After the hearing, the administrative law judge asked both parties to supplement the record with additional documentation and argument.<sup>15</sup> The Division supplied a supplemental submission and additional exhibits 15 – 19 on September 30, 2020. Mr. F supplied further argument and his additional exhibits 1 – 6 on December 21, 2020. Based on these additional submissions, the record in this case is now complete and the case is ripe for ruling.

### III. Discussion

In analyzing the F application, three issues exist. First, is there reasonable cause to justify accepting the request for an informal appeal 113 days after the deadline? Second, has Mr. F sufficiently demonstrated that he meets the eligibility requirements set forth in Alaska Statute 43.23.008? Third, has Mr. F properly challenged the validity of 15 AAC 233.163(c)(2)? Although Mr. F prevails on the first issue, he fails on the second and third.

#### A. Reasonable Cause for Late Appeal

The Division’s initial notice of denial to Mr. F is flawed in the manner it notifies him of the ability to request an informal appeal. Because of this, reasonable cause exists for his late-filed appeal request.

Per 15 AAC 05.010(b)(5), a request for appeal must be filed within 30 days of a notice of disallowance unless reasonable cause for the failure is shown.<sup>16</sup> This deadline is waivable by the administrative law judge on the similar but perhaps not identical basis that adhering to it would “work an injustice.”<sup>17</sup> Generally, “waivers have been available where confusing circumstances, particularly if contributed to by the Division, were a factor in the delay in starting an appeal...”<sup>18</sup> Though not addressing adherence to or waiver of deadlines, an Alaska statute specifies what

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<sup>13</sup> Div. Ex. 8.

<sup>14</sup> *See generally*, Motion to Dismiss Appeal Request, dated August 24, 2020.

<sup>15</sup> Request for Supplemental Submission by the Division, dated September 17, 2020; Order, dated October 21, 2020.

<sup>16</sup> 15 AAC 05.010(b)(5).

<sup>17</sup> 15 AAC 05.030(k). The regulation appears to delegate the decision to the ALJ hearing the case.

<sup>18</sup> *In re D.E.*, OAH No. 16-1348-PFD (Commissioner of Revenue, February 2017) (available online at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5751>).

must be done to appeal a decision from the Division regarding PFD eligibility. Specifically, AS 43.23.015(g) provides:

[i]f an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may, upon payment of a \$25 appeal fee, request the department to review its decision.<sup>19</sup>

The law further provides that when interpreting statutes like this, which allow for the review of decisions, they must be construed with strict fidelity to their terms.<sup>20</sup>

The Division acknowledges that its notice of right to an informal appeal language contained in its denial notice has previously been deemed problematic and that it has been alerted to this problem.<sup>21</sup> Nevertheless, it asserts that in this case, the denial notice was not potentially confusing in the same manner as it was found to be in an earlier case.<sup>22</sup>

But based on a plain reading of the appeal statute, all an applicant must do to secure their right to appeal is make a request and submit the appeal fee.<sup>23</sup> However, that is not what the Division's notice of denial suggests. Instead, it instructs that:

**If either the facts or the application of the law are incorrect, you have 30 days from the date of this letter to file a Request for informal Appeal.**

To have this denial reversed, **all** of the following and a **completed and valid Request for Informal Appeal form must be submitted or postmarked by August 11, 2019.**

- Proof T was not absent from Alaska for more than 45 days during 2018 in addition to any allowable absence(s).<sup>24</sup>

The problem with the Division's notice is that it attempts to link an applicant's right to appeal with contemporaneously 1) providing further proof; and 2) demonstrating that the facts or the law set forth in the denial are incorrect. The notice tells the applicant that the material identified must be submitted within "30 days from the date of this letter. . ." <sup>25</sup> However, the

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<sup>19</sup> AS 43.23.015(g).

<sup>20</sup> *Stone v. I.N.S.*, 514 U.S. 386 (1995).

<sup>21</sup> See *In re D. Q-E.*, OAH No. 20-0254-PFD (Commissioner of Revenue, June 2020) at 4-6 (available online at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6601>); *In re L P*, OAH 20-0350-PFD (Commissioner of Revenue, June 2020) at 4-7 (available online at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6599>).

<sup>22</sup> Motion to Dismiss Appeal Request at 7, n.31.

<sup>23</sup> AS 43.23.015(g).

<sup>24</sup> Div. Ex. 4, p. 1 (emphasis in original).

<sup>25</sup> Div. Ex. 4, p. 1.

appeal statute does not make an applicant's right to appeal contingent on the submission of further proof or evidence.<sup>26</sup> Instead, all that an applicant is required to do is to pay the necessary fee and submit an appeal request.<sup>27</sup> Likewise, the appeal regulation makes no mention of having to submit proof or argument along with the hearing request.<sup>28</sup>

Also, contrary to what the Division's notice suggests, even if the Division is correct in its recitation of the law and facts, an applicant still possesses a right to appeal. And, in such a circumstance, an applicant may even prevail on an appeal, because the Division might have erred in its analysis or its application of the law to the facts.

The Division points out that Mr. F had returned to Alaska by August 27, 2019, a mere 16 days after the informal appeal deadline. Yet, he waited over three additional months to file his request for an informal appeal.<sup>29</sup> But as Mr. F testified at the hearing, good cause existed for the delay, and the Division's notice of denial caused confusion and delay by Mr. F.<sup>30</sup> The initial portion of the delay was because Mr. F was outside of Alaska at sea during the appeal period.<sup>31</sup> When he returned, he took time to consult with S C from the Transportation Institute regarding assembling "proof" to support his arguments regarding his case because he thought that such "proof" was a necessary part of his informal appeal request.<sup>32</sup> The consultation with Mr. C continued to occur as late as November and December 2019.<sup>33</sup>

Once again, this is not an instance where it is merely suspected that the Division's notice of denial might have discouraged an applicant from timely requesting an appeal. Instead, it is quite evident that the language contained in the Division's notice of denial was likely at least partially responsible for the delay at issue. The Division's denial letter is inaccurate in that an applicant may well construe it as requiring more to initiate an appeal than is practically or legally required, including as intended by the Alaska Legislature in its creation of AS 43.23.015(g). Requiring these additional items at the outset has no legal basis and acts as an improper deterrent to appeals.

The other reason for the delay was because Mr. F was outside of Alaska and at sea during

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<sup>26</sup> AS 43.23.015(g).

<sup>27</sup> AS 43.23.015(g).

<sup>28</sup> 15 AAC 05.010(b)(5).

<sup>29</sup> Motion to Dismiss Appeal Request at 7.

<sup>30</sup> Testimony of Mr. F.

<sup>31</sup> Testimony of Mr. F; Div. Ex. 5, p. 2; Div. Ex. 8, pp. 2, 3, 4, 7.

<sup>32</sup> Testimony of Mr. F; Div. Ex. 7, pp. 9-11.

<sup>33</sup> Testimony of Mr. F; Div. Ex. 7, pp. 9-11.

the entirety of the appeal period. This fact further constitutes good cause for the delay by Mr. F in filing his request for an informal appeal.

Because the Division's denial letter misinformed Mr. F regarding what is required to perfect his appeal rights and because he was at sea outside of Alaska when the appeal period began and ended, good cause exists for extension of the deadline. Further, based on these same facts, enforcement of the deadline would, more likely than not, work an injustice. Accordingly, the Division's motion to dismiss Mr. F' late-filed appeal request is denied and the case will be considered on the merits.

*B. Eligibility Requirements Contained in AS 43.23.008*

The qualifying year for the 2019 dividend was 2018.<sup>34</sup> A PFD applicant must meet several eligibility requirements.<sup>35</sup> One of the eligibility requirements is that a person must have been absent from Alaska for no more than 180 days during the qualifying year unless he qualifies under one of the 17 absences allowed by Alaska Statute 43.23.008.<sup>36</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. Because Mr. F was undeniably absent from Alaska for 203 days in 2018, it is necessary to determine whether he qualifies under any of the special absences allowed by AS 43.23.008.

There are three potentially allowable absences applicable to Mr. F. One is an absence allowed while receiving secondary or postsecondary education on full-time basis.<sup>37</sup> A second is an absence for receiving vocational or professional education when a comparable program is not available in the state.<sup>38</sup> The third is an absence while serving aboard an oceangoing vessel of the United States as a merchant mariner.<sup>39</sup>

1. Application of AS 43.23.008(a)(1) - Receiving Secondary or Postsecondary Education

As the testimony and evidence reflects, some, if not all, of the 203 days Mr. F spent outside of Alaska in 2018 were while he was attending the Seafarers School or at sea as part of the School's apprenticeship program. Per AS 43.23.008(a)(1), an allowable absence may occur

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<sup>34</sup> AS 43.23.095(6).

<sup>35</sup> AS 43.23.005(a).

<sup>36</sup> AS 43.23.005(a)(6); AS 43.23.008.

<sup>37</sup> AS 43.23.008(a)(1).

<sup>38</sup> AS 43.23.008(a)(2).

<sup>39</sup> AS 43.23.008(a)(4).

while a person is “receiving secondary or postsecondary education on a full-time basis.”<sup>40</sup> The Division’s regulation implementing the statute provides as follows:

- (c) For purposes of
  - (1) AS 43.23.008(a)(1), receiving secondary or postsecondary education on a full-time basis means enrollment and attendance in good standing as a full-time student where participation requires absence from this state  
...
    - (B) for the purpose of pursuing a vocational certificate, associate, baccalaureate, or graduate degree, as a full-time student at a college, university, junior or community college, or postsecondary vocational institution accredited by an accrediting agency that the United States Secretary of Education recognizes under 34 C.F.R. Part 602, or . . . ;
    - (C) for the purpose of pursuing a vocational certificate, associate, baccalaureate, or graduate degree, as a full-time student
      - (i) at a Title IV institution recognized under 20 U.S.C. 1001 - 1155 (The Higher Education Act of 1965) and 34 C.F.R., Part 600; or
      - (ii) at a non-accredited college or university if students attending the college or university may qualify as eligible to receive a student loan from Nellie Mae, or if the college or university's credits or degrees are accepted by at least three Title IV institutions recognized under 20 U.S.C. 1001 - 1155 (the Higher Education Act of 1965) and 34 C.F.R., Part 600;<sup>41</sup>

As the Division correctly notes, there are two regulatory criteria that the Seafarers School must meet for some or all of Mr. F’ time outside of Alaska to qualify under AS 43.23.008(a)(1). First, if the school is accredited, it must be accredited by an accrediting agency recognized by the United States Secretary of Education.<sup>42</sup> Second and alternatively, if the school is not accredited, students attending the school must be eligible to receive student loans through Nellie Mae, or the

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<sup>40</sup> AS 43.23.008(a)(1).  
<sup>41</sup> 15 AAC 23.163(c).  
<sup>42</sup> 15 AAC 23.163(c)(1)(B).

school's credits or degrees must be accepted by at least three Title IV institutions.<sup>43</sup>

However, in this instance, the evidence establishes that the Seafarers School is not accredited in the manner required by the regulation.<sup>44</sup> Further, there was no evidence offered that students attending the Seafarers School are eligible for student loans through Nellie Mae or that the School's credits or degrees are accepted by at least three Title IV institutions.

Based on application of both AS 43.23.008(a)(1) and the regulation implementing that statutory provision, no portion of Mr. F's time outside of Alaska in 2018 qualifies as time away receiving secondary or post-secondary education.

2. Application of AS 43.23.008(a)(2) - Receiving Vocational or Professional Education

At the hearing, and in his formal appeal request, Mr. F suggested that AS 43.23.008(a)(2) may serve as justification for his eligibility to receive a PFD despite his lengthy absence from Alaska in 2018.<sup>45</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 Education, a comparable program is not reasonably available in the state.<sup>46</sup>

The Division's regulation implementing the statute further clarifies this category as follows:

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>47</sup>

Mr. F asserted that his participation in the Seafarers School was full-time vocational education in a profession important to Alaska and that his merchant marine training could not have been received in Alaska.<sup>48</sup> He also argued that the Division recently confirmed PFD eligibility on the basis of AS 43.23.008(a)(2) and 15 AAC.23.163(c)(2) for a N Q, despite Mr. Q's similar out-of-state attendance at a vocational program offered by the Business A Center

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<sup>43</sup> 15 AAC 23.163(c)(1)(C)(ii).

<sup>44</sup> Div. Ex. 11, pp. 1-3.

<sup>45</sup> Testimony of Mr. F; Div. Ex. 8, pp. 1-4.

<sup>46</sup> AS 43.23.008 (a)(2).

<sup>47</sup> 15 AAC.23.163(c)(2).

<sup>48</sup> Testimony of Mr. F; Div. Ex. 8, pp. 1-4.



and/or the Seafarers School.<sup>49</sup> As a threshold matter, however, even if the Seafarers School can be viewed as providing participants with a valuable vocational education, that does not make the program eligible as a basis for an allowable absence under AS 43.23.008(a)(2) and its implementing regulation.

Instead, the statute's implementing regulation, 15 AAC 23.163(c)(2), effectively requires an out-of-state program to be one in which a comparable program is not reasonably available in Alaska, and at an institution eligible to participate in financial aid programs administered by the Alaska Commission on Postsecondary Education ("ACPE"). Only upon such a determination by ACPE will a program be deemed to meet the regulatory criteria. While Mr. F did supply some history on the merchant mariner provision contained in AS 43.23.008 and some of the considerations that might apply to that,<sup>50</sup> he did not supply any documentation evidencing that the Seafarers School has been approved by the ACPE as required by the regulation.

On the other hand, the Division did further clarify this issue.<sup>51</sup> As it addressed, the requirements of 15 AAC 23.163(c)(2) must be read in conjunction with 20 AAC 15.922(b). This is because the former regulation requires that the out-of-state vocational program must be at an educational institution eligible to participate in financial aid programs administered by ACPE.<sup>52</sup> And, it is the latter regulation that addresses how this occurs.<sup>53</sup> Specifically, it provides:

To be eligible to participate in Alaska education loan programs, an institution must meet the requirements of AS 14.43 and this section *and be*

- (1) authorized under AS 14.48 and eligible under AS 14.43.120 (b);
- (2) approved as eligible to participate in Alaska education loan programs for the 1995-96 school year;
- (3) repealed 1/30/2003;

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<sup>49</sup> Testimony of Mr. F; Div. Ex. 7, pp. 9-10 (email from Division eligibility technician San Juan Ordonez to N Q, dated August 1, 2019). However, as the Division has since clarified, the referenced August 1, 2019 email exchange with Mr. Q was a "Division Error" due to the 2016 changes to 15 AAC 23.163(c)(2) effectively limiting the number of out-of-state training programs to only five schools. As such, Mr. Q's eligibility was ultimately denied and although he was erroneously paid a PFD, no repayment was required due to the Division's error. *See* Supplemental Submission by the Division, dated September 30, 2020, pp. 2-3. Because Mr. F is not being treated dissimilar to Q, the issue of Mr. Q will not be further addressed.

<sup>50</sup> *See generally*, T F Supplemental Argument and Exhibits 1 – 7, dated December 21, 2020.

<sup>51</sup> Supplemental Submission by the Division, pp. 2-3, Ex. 19.

<sup>52</sup> 15 AAC 23.163(c)(2).

<sup>53</sup> 20 AAC 15.922(b).

- (4) approved by the United States Department of Education, office of financial assistance, for receipt of federal student financial aid; or
- (5) certified as a flight school under 14 C.F.R. Part 141 or Part 142.<sup>54</sup>

Further, 20 AAC 15.922(c)(d) and (h) address the very specific pre-approval process that a school or vocational program must comply with to be placed on ACPE's approved list.

There are currently only five out-of-state vocational or educational programs on ACPE's list.<sup>55</sup> The Seafarers School is not one of those five programs. As the institutional authorization representative for ACPE, has indicated:

if a student is absent attending a school that is not approved for federal student aid through the United States Department of Education, office of financial assistance, *and* is not attending one of the 5 schools above, they are not eligible for financial aid through ACPE and thus are not eligible for the PFD under 15 AAC 163(c)(2).<sup>56</sup>

While Mr. F has supplied documentation evidencing that the Seafarers School has had its apprenticeship program approved by the United States Department of Labor,<sup>57</sup> nothing has been supplied which proves that the Seafarers School is approved for federal aid through the United States Department of Education. Further, even if it had, it has not also been pre-approved by ACPE as an eligible out-of-state educational or vocational program.

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.<sup>58</sup>

3. Application of AS 43.23.008(a)(4) - Serving Aboard an Oceangoing Vessel of the United States as a Merchant Mariner

Finally, per AS 43.23.008(a)(4), an allowable absence may occur when a person is "serving under foreign or coastal articles of employment aboard an oceangoing vessel of the United States merchant marine." However, also applicable is AS 43.23.008(a)(17)(C). It provides that a person remains eligible for a PFD if the individual's absence or cumulative

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<sup>54</sup> 20 AAC 15.922(b) (emphasis added).

<sup>55</sup> Supplemental Submission by the Division, Ex. 19 at p. 2.

<sup>56</sup> Supplemental Submission by the Division, Ex. 19 at p. 2 (emphasis added).

<sup>57</sup> T F Supplemental Argument, p. 1 and Exs. 4-5.

<sup>58</sup> See *In re: J. and D.B.*, OAH No. 05-0282-PFD, p. 2 (Commissioner of Revenue, 2006) (available online at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5122>).

absences do not exceed 45 days in addition to any absence or cumulative absences claimed while serving as a merchant mariner.

The problem in this instance is that even if the 95 days that Mr. F spent at sea aboard an oceangoing vessel in 2018 as part of his apprenticeship program is construed as “employment aboard an oceangoing vessel of the United States merchant marine,”<sup>59</sup> he was still absent from Alaska longer than allowed. This is because, per AS 43.23.008(a)(17)(C), he was only allowed an additional 45 days of absence beyond time away at sea aboard a vessel as a merchant marine. Here, it is undeniable that Mr. F spent at least another 108 days outside of Alaska in classroom instruction at the Seafarers School in State A in addition to his days at sea.

As such, even if Mr. F is given the benefit of the doubt and allowed to characterize his apprenticeship as falling within the time outside Alaska allowed to merchant mariners, he was still far in excess of the time allowed outside Alaska in the qualifying year to remain eligible for a PFD.

*C. Challenge to the Validity of 15 AAC 233.163(c)(2)*

In a proposal for action filed by Mr. F after the proposed decision in this case, he argues at length challenging Department of Revenue regulation 15 AAC 233.163(c)(2). He contends that the regulation is invalid because it is inconsistent with AS 43.23.008(a)(4); is contrary to the statute’s legislative history; is arbitrary; and fails to provide adequate public notice.<sup>60</sup>

Mr. F’ contention regarding the regulation being arbitrary was addressed before the hearing, at the hearing, following the hearing, and in the proposed decision.<sup>61</sup> As a consequence,

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<sup>59</sup> It is questionable whether the 95 days Mr. F spent at sea on a vessel in 2018 as part of the Seafarers School’s apprenticeship program qualifies under AS 43.23.008(4). First, at the time this occurred, and as the evidence reflects, Mr. F was a student seeking to become a merchant mariner. But he was not yet a merchant mariner as the statute impliedly requires. Second, it is questionable whether Mr. F can be said to have been “employed,” as a merchant mariner since, at the time, he was participating as a ‘unlicensed apprentice,’ ‘non-crewmember’ in the Seafarers School’s apprenticeship program as part of his curriculum requirement. He was also only being nominally compensated. *See* Div. Ex. 3, p. 5. Third, there does not appear to be any evidence in the record regarding whether the vessel he was serving on was “an oceangoing vessel of the United States merchant marine” as the statute requires. But, even if all of these facts were construed in Mr. F’ favor, for the reasons explained, Mr. F still exceeds the time he was allowed to be outside of Alaska during the qualifying year per AS 43.23.008(a)(17)(C).

<sup>60</sup> *See generally*, F Proposal for Action, dated January 13, 2021.

<sup>61</sup> The primary argument Mr. F has made on this point is his contention that the Department of Revenue has, in the past, deemed attendance at the Seafarers School to be an allowable absence. F PFA at 2. This issue was explored at the hearing and in post-hearing briefing. *See, e.g.*, Request for Supplemental Submission by the Division, dated September 17, 2020; Supplemental Submission by the Division, dated September 20, 2020; Invitation for a Response by the Applicant, dated October 1, 2020; Amended Invitation for a Response by the Applicant, dated October 6, 2020; F Letter and Exhibits to OAH, received December 21, 2020 (failing to address the argument at issue). The Proposed Decision also addressed this point. *See* Notice of Proposed Decision, dated December 28, 2020, at p. 9 n.49.

there is no need to reexamine it here.

As to Mr. F' remaining challenges to the regulation, he has the burden of proof in this case to demonstrate that the Division's decision was incorrect.<sup>62</sup> He had multiple opportunities to specifically raise and argue the above-referenced issues, including in his request for an informal appeal,<sup>63</sup> his request for formal hearing,<sup>64</sup> during the hearing itself,<sup>65</sup> and in briefing and supplementation of the record after the hearing.<sup>66</sup> Although he has consistently contended that he qualifies for a PFD per the statute and regulation, he failed to specifically raise the above arguments until long after the hearing itself. Notably, these arguments are far different than simply contending that he was eligible for a PFD per the statute and regulation.

He first alluded to these arguments, in a very general way, in his post-hearing submissions on December 21, 2020.<sup>67</sup> However, the reason he was asked to provide those submissions was to address the specific issue of whether the Division previously granted a PFD to another applicant who had also attended the Seafarers School.<sup>68</sup> It was not until the proposal for action filed by Mr. F on January 13, 2021, after the proposed decision in this case, that he for the first time raised specific and detailed challenges to 15 AAC 233.163(c)(2).<sup>69</sup>

The issues raised by Mr. F in his proposal for action may or may not create valid issues regarding the consistency between AS 43.23.008(a)(4) and 15 AAC 233.163(c)(2) and the enforceability of the regulation. Had Mr. F articulated these challenges in his informal appeal, request for formal hearing, during the hearing itself, or in the briefing and supplementation of the record after the hearing, then it might be appropriate for those issues to be considered here. However, he did not.

These challenges were not made in detail until his proposal for action. Consequently, Mr. F has failed to sustain his burden of proof in this case as to his challenges to 15 AAC 233.163(c)(2) despite many earlier opportunities to do so. It would subvert the appeal process to entertain those challenges now.

Another applicant, on another set of facts, may not be foreclosed from asserting that the

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<sup>62</sup> 15 AAC 05.030(h).

<sup>63</sup> Div. Ex. 5.

<sup>64</sup> Div. Ex. 8.

<sup>65</sup> *See generally*, Hearing Transcript from August 31, 2020.

<sup>66</sup> F Letter and Exhibits received December 21, 2020.

<sup>67</sup> F Letter and Exhibits to OAH, received December 21, 2020.

<sup>68</sup> *See n.61*.

<sup>69</sup> F Proposal for Action.

regulation is invalid. They would simply need to raise such issues with specificity and in detail early in the process as opposed to after a proposed decision. Such issues can also appropriately be addressed by policy makers within the Department of Revenue and at the Alaska Legislature. However, because of the manner and timing in which these issues were raised here, it is not appropriate to address them further in this decision.

#### **IV. Conclusion**

The Division's motion to dismiss the appeal on grounds of untimeliness is DENIED. As discussed, good cause exists in this instance for the late-filed informal appeal request. Further, applying the appeal deadline in these circumstances would work an injustice because the Division's notice of appeal rights was inaccurate.

However, the Division's decision to deny a 2019 PFD to Mr. F is AFFIRMED. During the 2018 qualifying year, Mr. F spent 203 days outside of Alaska. This time away included 95 days participating in an apprenticeship program aboard an oceangoing vessel. Even if this time were construed as satisfying service as a merchant mariner aboard an oceangoing vessel of the United States, Mr. F still exceeded the amount of time he was entitled to spend outside Alaska to remain eligible for a PFD. This is because none of the remaining 108 days he spent outside of Alaska in 2018 can be construed as receiving allowed secondary or postsecondary education or vocational or professional education.

Finally, Mr. F has not sustained his burden of proof nor properly raised challenges to 15 AAC 233.163(c)(2). Accordingly, those will not be further considered.

DATED this 29<sup>th</sup> day of January 2021.

By: Signed \_\_\_\_\_  
Z. Kent Sullivan  
Administrative Law Judge  
Final Decision Maker by Delegation

**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.**

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]