

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

IN THE MATTER OF)
)
 L L)
) Case No. OAH 06-0133-PFD
2005 Permanent Fund Dividend)

DECISION & ORDER

I. Introduction

L L timely applied for a 2005 permanent fund dividend. The Permanent Fund Dividend Division determined that Ms. L was not eligible, and it denied the application initially and at the informal appeal level. Ms. L requested a formal hearing by written correspondence. Upon reviewing the file, Administrative Law Judge Dale Whitney finds the applicant to be eligible for a 2005 dividend.

II. Facts

Ms. L was convicted of a misdemeanor in 2001 in case number 3AN-01-XXXX CR. She was convicted of another misdemeanor on January 7, 2003, for a case arising out of No Name in case number 3XX-03-XXXX CR. Finally, she was convicted of two misdemeanor counts on June 10, 2003, in case number 3AN-03-XXXX CR.

In the last case, Ms. L was sentenced on June 10, 2003, to 180 days with 150 suspended for one count, and 90 days with 90 suspended in another count. Ms. L served the 30 days that were not suspended, and she was released from prison on June 27, 2003. On November 5, 2003, the Municipality of Anchorage filed a petition to revoke probation for failure to report to the Anchorage Alcohol Safety Action Program (ASAP). On November 12, 2003, the court issued a bench warrant for Ms. L's arrest. On December 18, 2003, Ms. L filed a motion to extend the time for her community work service. The court granted the motion on December 19, 2003. On March 19, 2004, Ms. L filed another motion to extend the time regarding her community work service. On March 22, 2004, the court granted the motion to extend time for community work service, and scheduled an arraignment on the ASAP bench warrant for April 7, 2004. The court's notice of the arraignment was returned in the mail undelivered, and Ms. L did not appear on April 7, at which time the court left the bench warrant in effect. On April 13, 2004, Ms. L filed a motion to quash the bench warrant and reassign her to ASAP. On April 15, 2004, the court scheduled another arraignment on the bench warrant for April 28, 2004. On April 20, 2004, Ms. L filed proof that she

had completed her community work service. On April 28, 2004, the arraignment was held, and the judge cancelled the bench warrant. On May 5, 2004 the court entered an order modifying probation, in which Ms. L was reassigned to ASAP. There has been no further action in the case by the court, except that in 2005 the fine was referred to a collection agency.

On September 18, 2004, Ms. L was arrested and held overnight before being released. Except for Ms. L's account, there is no explanation in the record of why Ms. L was arrested. There is no evidence that the court ever imposed any additional jail time beyond the thirty days, minus credit for good time, that Ms. L originally served in 2003. According to Ms. L,

I had a PTRP and I had court with No Name to squash my warrant & they did but in the system it said I had a warrant out for my arrest. The state trooper said it was for No Name but I've never been there so it should've said NO NAME instead. Because my assault was transferred to No Name.

In her informal appeal request, Ms. L had written,

The reason they arrested me last year because in the system they said that I had a warrant out for my arrest in No Name. I've never been to No Name, so I called No Name and they sent a letter saying that I attend my court dates and that I shouldn't have had one out for my arrest since I was current with everything.

It appears that Ms. L was arrested and held overnight for no other reason than because there had been an error in the trooper's database, or that the court clerk had failed to notify the troopers that the warrant issued on November 12, 2003, had been quashed. Although the Department of Corrections maintained a credit on Ms. L's account for two extra days served on the case, it appears that Ms. L had not committed any wrongdoing that would lead a judge to impose any of the time that had been suspended in the case.

III. Discussion

A person is not eligible for a permanent fund dividend if the person was incarcerated at any time during the qualifying year as the result of conviction in this state of a misdemeanor, and the person has previously been convicted of two other misdemeanors.¹ If a person is on probation during the qualifying year for a prior offense, and probation is revoked and a portion of a suspended sentence is imposed, that person will have been incarcerated as the result of a conviction of a misdemeanor. While people sometimes believe incarceration as the result of probation violation is different from incarceration as the result of a misdemeanor, the incarceration is the result of the

¹ AS 43.23.005(d)(2).
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original misdemeanor conviction. The probation violation is merely the proceeding by which the court returns the defendant to prison to serve a part of the original sentence that was suspended. In this case, if the judge had imposed two days of the suspended portion of Ms. L's sentence and given her credit for her overnight stay at the No Name pretrial facility, Ms. L would be ineligible for a dividend because she had been incarcerated during the qualifying year as the result of conviction of the original misdemeanor.

It may happen that a person is arrested and incarcerated overnight for an alleged probation violation, but that the court does not impose any of the suspended time from the original sentence. Usually there will be a hearing, which may be called a disposition hearing in a felony case or simply an arraignment in a misdemeanor, which occurs some time after the alleged probation violation. In this hearing, the defendant may be able to prove that he or she did not violate the terms of probation as the state alleges. Or the judge may decide that the violation is so minor that it does not warrant imposition of any of the suspended time, or that the defendant's good conduct after the violation but before the disposition hearing showed that no additional jail time was necessary. Sometimes a defendant at a disposition hearing will receive a stern warning from the judge, an additional fine or community work service, or a change in conditions of release, but no additional jail time. If the violation alleged is an alcoholic or drug relapse, the parties and the court may agree to postpone the disposition hearing, and then to dismiss the petition if the defendant successfully gets back into treatment. In other cases, the state may dismiss a petition to revoke probation without even going to court if the defendant can persuade the D.A. that under the circumstances of the case, the defendant should be given another chance at probation. This is not uncommon when the violation is minor, and the defendant is otherwise doing well in life.

In all of these cases, the Department of Corrections' records would show two days having been served for the offense. In fact, the time would remain suspended. In the eyes of the court, the defendant would have received no credit for the time the person was in jail for the alleged probation violation. If the defendant later completed probation with no further violations, his court records would show that he did not serve any time other than the amount that was originally imposed.

Time spent in jail during the qualifying year cannot be considered time that the applicant was incarcerated as the result of the conviction of a misdemeanor or felony if the court does not recognize that serving time from the original sentence is appropriate. Rather than resulting from conviction of a crime, the time might very well have been served as the result of police mistake, or a clerical error from the court. The time should not be considered to have been served as the result of

a conviction unless a judge has ordered the time to be served. Further, the time should be deemed to have been served at the time of the disposition hearing, not at the time the defendant was actually arrested.²

In Ms. L's case, there is no evidence that the court ever gave her credit for her overnight stay during 2004. She was incarcerated as the result of a clerical error, not as the result of conviction of a crime. Ms. L was not incarcerated at any other time during 2004. Under these circumstances, there is no basis to find Ms. L ineligible for a 2005 dividend.

IV. Conclusion

Although she did spend one night in jail in 2004, there is no evidence that Ms. L was incarcerated as the result of conviction of a felony or misdemeanor at any time during that year. She is therefore eligible for a 2005 dividend.

V. Order

IT IS HEREBY ORDERED that the application of L L for a 2005 permanent fund dividend be GRANTED.

DATED this 5th day of September, 2006.

By: Signed
DALE WHITNEY
Administrative Law Judge

² No law directly requires incarceration to be deemed to commence at the time the court imposes previously suspended jail time, but the following hypothetical example, which would not be unusual in Alaska, shows the logic. The court issues a bench warrant because the probationer has not paid restitution as ordered. The defendant's attorney immediately files a motion to quash the warrant along with a receipt for the fully paid restitution. The judge orders the warrant to be quashed, and the court clerk faxes a copy of the order to the defendant's local village police officer. The clerk's fax receipt shows that the fax has been received, but the police officer doesn't read it until two days later when a new ink cartridge for his fax machine arrives in the mail. The officer then releases the defendant, whom he has arrested, and the Department of Corrections logs two days of credit for time served on the case. Four years later, the state petitions to revoke probation for failure to perform ten hours of community work service. The court issues a summons, and the defendant calls in by phone for his disposition hearing. The judge cancels the community work service requirement and imposes two days of suspended jail time to be served immediately. Because the defendant already has credit for two days in the case, the defendant is not arrested, and nothing further happens until the period of probation ends and the defendant is discharged from probation. In this scenario, if jail time is deemed to commence at the time the suspended sentence is imposed, the defendant will be ineligible for the next year's PFD. If the time is deemed served at the actual time the defendant is incarcerated, the defendant will become ineligible for a dividend that had already been issued and cannot be recovered under AS 43.23.035(b), but he will still remain eligible for the next year's dividend.

Adoption

This Order is issued under the authority of AS 44.33.010 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 of the date of this decision.

DATED this 3rd day of October, 2006.

By: Signed
Signature
Dale A. Whitney
Name
Administrative Law Judge
Title

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