

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

In the Matter of)	
)	
J. G. H.)	
)	
<u>2007 Permanent Fund Dividend</u>)	OAH No. 08-0164-PFD Agency No. 2007-032-1995

DECISION & ORDER

I. Introduction

J. G. H.'s application for a 2007 permanent fund dividend (PFD) was denied because the Permanent Fund Dividend Division determined that he had been incarcerated during the qualifying year under circumstances that would render him ineligible. Following an unsuccessful informal appeal, Mr. H. requested a formal hearing. Although he failed to attend the hearing he requested, his case has been evaluated carefully on the record available. The Division's denial of Mr. H.'s application is affirmed because he indeed had a disqualifying incarceration during the qualifying year.

II. Facts

J. H. of Anchorage timely applied for a 2007 PFD. There are no issues regarding his eligibility apart from his incarceration during the preceding year.

Mr. H. was jailed from January 23, 2006 to February 22, 2006.¹ The incarceration related to Case No. 3AN-00-0000CR, growing out of a 2005 misdemeanor charge of driving with a revoked or suspended license.² Mr. H. was convicted of that charge on February 22, 2008 and sentenced to 180 days in jail, with 150 days suspended.³ Thus, his sentence included 30 days of actual jail time.

Notably, Mr. H. was released from incarceration the day he was convicted.⁴ This is because, having been jailed on January 23, he had already served the 30 days of his sentence that were not suspended. His jail time preceded his conviction.⁵

¹ Exhibit 5, p. 1 (Corrections Identification Verification Form for PC/80); Exhibit 4, p. 11 (OTIS-WEB Search Results for Offender: 411735).

² Docket Search for 3AN-00-0000CR (final attachment to PFD Division's Submission to the Record dated May 14, 2008).

³ *Id.*

⁴ Exhibit 4, p. 11 (OTIS-WEB Search Results for Offender: 411735).

⁵ In Mr. H.'s case, this seems to be because he had failed to appear at his first scheduled trial on the charge and was arrested about a month later on a bench warrant. Awaiting a new trial date, he was held without bail. *Id.*

At the time of his 2006 incarceration, Mr. H. had been convicted of at least the following misdemeanors committed since December 31, 1995:⁶

July 2001	Failure to stop at direction of officer
Sept. 2002	Attempted misconduct involving controlled substance
Sept. 2002	Attempted auto theft
Oct. 2004	Driving with license revoked/suspended
Mar. 2005	Vehicle tampering

After the PFD Division denied his application for a 2007 dividend and held to that position through an informal appeal, Mr. H. initiated this appeal. He failed to appear at his hearing, and efforts to reach him at his telephone numbers were unsuccessful. A notice was issued giving him ten days to show reasonable cause for his absence and to request a new hearing, but he did not respond.

III. Discussion

Although Mr. H. did not participate in his own appeal, the administrative law judge has carefully reviewed the record available to evaluate Mr. H.'s eligibility.

The Alaska legislature has directed that "an individual is not eligible for a permanent fund dividend for a dividend year when . . . during all or part of the qualifying year, the individual was incarcerated as a result of the conviction in this state of a . . . misdemeanor if the individual has been convicted of . . . (i) a prior felony as defined in AS 11.81.900; or (ii) two or more prior misdemeanors as defined in AS 11.81.900."⁷ The statute counts prior convictions for misdemeanors committed on or after January 1, 1997.⁸

The qualifying year for a 2007 dividend was 2006.⁹ Mr. H. had been convicted prior to that year of two or more misdemeanors committed since 1997. Therefore, if he was incarcerated in 2006 as a result of a misdemeanor conviction, he would disqualify himself from a 2007 dividend.

The sole question in this appeal is whether Mr. H.'s pre-trial incarceration in 2006 in connection with Case No. 3AN-00-0000CR can be said to be "as a result of" a misdemeanor

⁶ Exhibits 4, 5.

⁷ AS 43.23.005(d). The two definitions from Title 11 simply specify that misdemeanors are crimes for which sentences greater than one year cannot be imposed, while felonies are crimes for which such sentences can be imposed.

⁸ Sec. 6, ch. 46 SLA 1996 (quoted in editor's note to AS 43.23.005).

⁹ AS 43.23.095(6).

conviction. It is a question that arises with some frequency regarding defendants who fail to make, or are ineligible for, bail, and who at their later conviction are given a jail sentence but are discharged immediately because the time has already been served.

The Department of Revenue addressed this question long ago by promising to interpret the statute (or, more precisely, a similar prior version of the statute) such that all time served against a jail sentence would be deemed to have been served beginning on the date of conviction, and would be counted as jail time “as a result of” the conviction. The department made this promise to the Alaska Supreme Court to avoid constitutional concerns about the statute, and the Supreme Court recorded the promise in its opinion upholding the statute.¹⁰ If the statute were interpreted otherwise, there could be disparate treatment of similarly-situated defendants: two defendants convicted of the same offense and given identical sentences might have different eligibility if one had served the sentence before conviction and the other had made bail and therefore served it only after conviction.

Interpreting the PFD eligibility statute in accordance with this promise, one must apply the incarceration rule as though the 30 days of actual incarceration to which Mr. H. was sentenced commenced on February 22, 2006 (the date of his conviction) and continued until 30 days afterward. This would be a disqualifying incarceration for the 2007 dividend.

IV. Conclusion

Mr. H.’s incarceration as a result of a misdemeanor conviction in 2006 disqualifies him from a 2007 PFD.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of J. G. H. for a 2007 permanent fund dividend is AFFIRMED.

DATED this 17th day of June, 2008.

By: Signed
Christopher Kennedy
Administrative Law Judge

¹⁰ *State v. Anthony*, 810 P.2d 155, 162 (Alaska 1991). *See also* Memorandum from Deborah Vogt, Deputy Commissioner to Bob Cole, Director of Administrative Services, July 2, 1997 (discussing details of policy); *In re A.P.*, OAH No. 07-0343-PFD (2007).

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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of July, 2008.

Signed

Signature

Christopher Kennedy

Name

[Commissioner's Delegee]

Title

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