

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

In the Matter of :)	
)	
D. B.)	
)	OAH No. 08-0697-PFD
<u>2008 Alaska Permanent Fund dividend</u>)	DOR No. 2008-019-3369

DECISION

I. Introduction

D. B. filed a timely application for a 2008 Alaska Permanent Fund dividend. The Permanent Fund Dividend Division denied the application pursuant to AS 43.23.005(d)(2)(B)(ii), on the ground that Mr. B. had been incarcerated during the 2007 qualifying year, and that he had twice previously been convicted of a misdemeanor.

Mr. B. filed an appeal. The assigned administrative law judge convened a telephonic hearing on February 2, 2009. Mr. B. participated, and Peter Scott represented the division.

Mr. B. was incarcerated during 2007 as a result of a 2006 misdemeanor conviction. For purposes of AS 43.23.005(d)(2)(B)(ii), Mr. B. has only one misdemeanor conviction prior to the 2006 conviction that resulted in his 2007 incarceration. The division's decision is therefore reversed.

II. Facts

Prior to 2007, D. B. was convicted of three misdemeanor offenses:¹ first, on April 7, 2005 (No. 3AN-05-00000CR; driving while intoxicated; AMC 9.28.020(A));² second, on December 14, 2005 (No. 3AN-05-00000; assault; AMC 8.10.010(B)(1));³ third, on February 13, 2006 (No. 3AN 06-00000CR; driving with invalid license; AMC 9.28.019(B)).⁴

For the first conviction, Mr. B. was sentenced to 90 days in jail, with all but five suspended, and was immediately remanded to custody.⁵ For the second conviction, Mr. B. was given a suspended imposition of sentence and the conviction was set aside on June 11, 2008.⁶

¹ Mr. B. has been charged but not convicted in two other cases: No. 3AN-06-00000CR, and No. 3AN-07-00000CR. Exhibit 10, page 1. Other criminal cases listed under his name are: No. 3AN-03-00000CR; No. 3AN-04-00000CR; and No. 3AN-06-00000CR. Exhibit 6.

² Exhibit 6, page 1; Exhibit 8; Exhibit 10, page 1.

³ Exhibit 6, page 1; Exhibit 9, pages 1, 9; Exhibit 10, page 1

⁴ Exhibit 6, page 1; Exhibit 7, page 1; Exhibit 10, page 1.

⁵ Exhibit 8, pages 3-4.

⁶ Exhibit 9, pages 3-4, 9.

For the third conviction, on February 13, 2006, Mr. B. was sentenced to 30 days in jail, with all of the jail time suspended, and was placed on probation.⁷ On February 12, 2007, a petition to revoke Mr. B.’s probation on the 2006 conviction was filed;⁸ on April 9, 2007, the petition was granted and 10 days of the previously-suspended jail term were imposed for his failure to appear for community work service required as a condition of his probation; on May 2, 2007, he was remanded to the Cordova Center to serve those ten days.⁹

III. Discussion

AS 43.23.005(d)(2)(B)(ii) provides that an individual is ineligible for an Alaska Permanent Fund dividend if during 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...two or more prior misdemeanors....”

A. Mr. B. Was Imprisoned in 2007 as a Result of a Misdemeanor Conviction

The division’s position statement asserts that Mr. B. was incarcerated in 2007 as a result of a misdemeanor conviction, characterizing the probation revocation as equivalent to a criminal conviction.¹⁰ That characterization is wrong: a probation revocation is not a criminal conviction. Probation is “a procedure under which a defendant, found guilty of a crime..., is released by the superior court subject to conditions imposed by the court...[.]”¹¹ except for any period of imprisonment imposed as a special condition of probation when imposition of sentence is suspended.¹² Revocation of probation for violation of the conditions of probation may be the result of criminal or non-criminal conduct.¹³ In this particular case, Mr. B.’s probation was revoked because he failed to appear for community service, conduct which was a violation of the conditions of his probation, but that was not a criminal offense.¹⁴ But even if Mr. B.’s probation had been revoked for criminal conduct, the probation revocation would not have been a criminal

⁷ Exhibit 7, page 5.

⁸ Exhibit 7, page 5.

⁹ Exhibit 7, pages 3-4; Exhibit 10, page 1.

¹⁰ “On 4/9/2007 Mr. B. was...charged with a PTRP (Petition to Revoke Probation) – which was a second misdemeanor conviction (under the same case number) and resulted in a sentence of 10 days in jail.” Position Statement at 3.

¹¹ AS 33.05.080(s).

¹² *Id.*; AS 12.55.086.

¹³ AS 12.55.085(b)(1), (2); AS 12.55.110. See *Hoffman v. State*, 404 P.2d 644 (Alaska 1965).

¹⁴ Under AS 11.56.757 it is a crime to violate the conditions of release on bail under AS 12.30; however, no provision of law has been identified that makes it a crime to violate the terms of conditions of release on probation under AS 33.05.080 or AS 12.55.086.

conviction: probation revocation occurs as a result of a finding by a judge based on a preponderance of the evidence, and a criminal conviction requires a finding by a jury (unless the defendant waives a jury trial) based on evidence beyond a reasonable doubt. For these reasons, it is incorrect to characterize a probation revocation as equivalent to a misdemeanor conviction.

As the commissioner has ruled in prior cases, however, imprisonment following a probation revocation proceeding is nonetheless a result of a criminal conviction.¹⁵ To be sure, Mr. B.'s 2007 imprisonment was the immediate and direct result of the probation revocation. But the probationary term that was revoked had been imposed in connection with his 2006 misdemeanor conviction. An event may have multiple causes, and may reasonably be said to be a result of each of them. Mr. B.'s 2006 misdemeanor conviction was not the sole cause of his 2007 imprisonment, but it was the initial link in the chain of events leading to that imprisonment: his 2007 imprisonment was thus "a result" of the 2006 conviction within the meaning of AS 43.23.005(d).¹⁶

B. A Set Aside Conviction is a Not Prior Conviction Under AS 43.23.005(d)(2)(B)

The division argues¹⁷ that a misdemeanor conviction that has been set aside remains a "conviction of...[a] prior misdemeanor" for purposes of AS 43.23.005(d)(2)(B)(ii). First, the division points to the wording of AS 43.23.005(g).¹⁸ Second, the division points to its own forms, which expressly advise applicants that "a court order 'setting aside' a conviction after completion of the terms of a suspended imposition of sentence, will not make you eligible."¹⁹

¹⁵ See In Re L.L., OAH No. 06-0133-PFD at 3 (September, 2006); In Re M. D., Department of Revenue Case No. 040179 (2004); In Re H.S., Department of Revenue Case No. 040091 (2004); In Re A.A., Department of Revenue Case No. 030821 (2004).

¹⁶ A dictionary defines "result" as "something that results as a consequence, issue or conclusion..." Webster's Ninth New Collegiate Dictionary (1990) at 1006. Elsewhere, the same dictionary describes the terms "effect," "consequence," "result," and "issue" among others, as synonyms, stating that they refer to: a condition or occurrence traceable to a cause. EFFECT designates something that necessarily and directly flows or occurs by reason of a cause [hence, "cause and effect"]; CONSEQUENCE implies a looser or remoter connection with a cause and usu[ally] implies that the cause is no longer operating; RESULT applies often to the last in a series of effects...; an ISSUE is often a result that ends or solves a difficulty...

Id. at 397 (emphasis in original). It defines "conclusion" as "the last part of something", such as a result or outcome. *Id.* at 273. These dictionary definitions point to the use of the word "result" as suggesting the last in a series of directly related causal events; this is the meaning adopted here. *Cf. In Re L.A.H.*, OAH No. 08-0662-PFD at 2-3 (May 5, 2009) (incarceration following arrest is a "result" of subsequent conviction if credited with time served).

¹⁷ Position Statement at 2.

¹⁸ Position Statement at 2.

¹⁹ *Id.* See Exhibit 3, page 3.

The division's arguments do not take into account the applicable general legal principles. The Alaska Supreme Court addressed the adverse consequences of a set aside conviction at considerable length in a recent case, State v. Platt.²⁰ The court stated:

In Alaska a conviction that has been set aside loses much of its legal importance in future legal proceedings. A set aside conviction does not qualify as “a ‘conviction’ in situations in which a sentence is increased or a crime is defined by a prior conviction.” It cannot trigger a presumptive sentence and can be used as an affirmative defense to some repeat offender statutes. In other words, the act of setting a conviction aside creates “a settled expectation that the state [will] not subsequently use the conviction...as a basis for imposing brand-new affirmative burdens on [the defendant]”.

Although setting aside a conviction limits the consequences of the conviction itself, it does not change the fact that an individual was previously found guilty of committing a crime.... [I]t “does not mean that the crime, and the events surrounding the crime, never occurred.” Setting aside a conviction does not expunge the conviction from the individual’s criminal record, which means that “[b]oth the conviction and the judgment setting it aside consequently remain in the public record.” Thus, although the set aside shows that the defendant has made “a substantial showing of rehabilitation,” it does not erase the fact of conviction.^[21]

Taking into account these general principles, the court concluded that, consistent with the Board of Nursing’s “duty to protect the ‘health, safety and welfare of clients served by nurse aides,’” a set aside conviction could be considered by the board in determining whether to grant a license as a certified nurse aide; the court ruled that a statute that imposes adverse consequences on a person who has been convicted may be applied to a person whose conviction has been set aside when those consequences “appear to be within the contemplation of the legislature that enacted [the statute].”²²

The division also fails to take into account prior administrative decisions on point. In a decision issued in 2001, the commissioner of revenue concluded that the legislature did not intend to include a set aside conviction as a prior conviction for purposes of AS 43.23.005(d)(2)(B).²³ In that case, the commissioner specifically rejected the argument advanced by the division that AS 43.23.005(g) supports its interpretation.²⁴ Furthermore, the

²⁰ State, Division of Corporations, Business and Professional Licensing, Alaska Board of Nursing v. Platt, 169 P.3d 595 (Alaska 2007).

²¹ *Id.*, 169 P.3d at 599 [footnotes and citations omitted].

²² *Id.*, 169 P.3d at 600.

²³ In Re A.H., Department of Revenue Case No. 010031 (June 11, 2001).

²⁴ *Id.*, at 3, note 1.

commissioner observed that the wording of AS 43.23.005(d) “suggests that [the legislature] intended set aside convictions to not be considered when counting prior offenses.”²⁵ The commissioner added that this interpretation is consistent with the treatment afforded set aside convictions for purposes of presumptive sentencing.²⁶

Consideration of a set aside conviction for purposes of permanent fund dividend eligibility has nothing in common with the public health and safety concerns that lead the court to conclude that a set aside conviction was within the scope of the statute at issue in State v. Platt; rather, it is a variant of the recidivism concerns at issue in the presumptive sentencing context, and in that context a set aside conviction is disregarded.²⁷ The division has made no showing that the commissioner’s prior decision was wrongly decided as a matter of law or policy, and it offers no explanation for the fact that its forms directly contradict that decision. Established agency precedent will therefore be applied in this case.²⁸ As stated in the commissioner’s prior decision, a conviction that has been set aside by the time a final administrative decision is issued is not a prior conviction for purposes of AS 43.23.005(d)(2)(B).²⁹

C. A Prior Misdemeanor Means Prior to the Conviction Resulting in Incarceration

As discussed in sections A and B, above, two issues raised by the facts of this case have previously been decided by the commissioner: whether incarceration for a probation violation is a result of the underlying conviction, and whether a set aside conviction is a conviction for purposes of AS 43.23.005(d)(2)(B)(ii). The case raises a third issue, however, which has not previously been decided by the commissioner.

Not including the set aside conviction, Mr. B. had two misdemeanor convictions prior to his incarceration in 2007: No. 3AN 05-03103CR in 2005 and No. 3AN 06-01147CR in 2006.³⁰ Thus, whether the 2006 misdemeanor conviction is a “prior misdemeanor” within the meaning of AS 43.23.005(d)(2)(B)(ii) depends on whether a “prior misdemeanor” means “a misdemeanor

²⁵ *Id.*, at 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See generally, May v. State, Commercial Fisheries Entry Commission, 168 P.3d 873, 884 (Alaska 2007); Alaska Public Interest Group v. State, 167 P.3d 27, 42 (Alaska 2007).

²⁹ In Re A.H., Department of Revenue Case No. 010031 at 4 (June 11, 2001) (misdemeanor conviction set aside after date of application, but before final administrative decision, is not prior conviction in absence of regulation on point).

³⁰ Position Statement at 3.

prior to the conviction from which the incarceration results,” or “a misdemeanor prior to the incarceration.” Under the latter interpretation, Mr. B. would be ineligible for the 2008 dividend, because he had two misdemeanor convictions prior to his 2007 imprisonment.

AS 43.23.005(d) states:

(d) [A]n individual is not eligible for a permanent fund dividend for a dividend year when

(1) during the qualifying year, the individual was sentenced as a result of conviction in this state of a felony; or

(2) during all or part of the qualifying year, the individual was incarcerated as a result of the conviction in this state of a

(A) felony; or

(B) misdemeanor if the individual has been convicted of

(i) a prior felony...; or

(ii) two or more prior misdemeanors...

Stripped of extraneous words, the relevant language is: “During the qualifying year, the individual was incarcerated as a result of the conviction of a misdemeanor if the individual has been convicted of two or more prior misdemeanors.” The more natural and common sense reading of this language is that a prior misdemeanor is one that occurred before the conviction that resulted in incarceration. This reading is consistent with the legislative history of Senate Bill 232, which enacted the relevant language.³¹ The bill’s sponsor, Senator Frank specifically advised the Senate Finance Committee that “the proposed bill would remove third-time misdemeanants from eligibility for permanent fund dividends.”³² Similar comments were made by Senator Frank’s staff and by the director of the Permanent Fund Dividend Division before the

³¹ See §§2-3, ch. 46, SLA 1996.

³² Senate Finance Committee Minutes, April 15, 1996.

House Judiciary Committee.³³ In light of the legislative history, the word “prior” in AS 43.23.005(d)(2)(B)(ii) is interpreted to mean “prior to the conviction that resulted incarceration during the qualifying year.” Mr. B. does not have two misdemeanor convictions prior the 2006 conviction that resulted in his 2007 incarceration.

IV. Conclusion

The division’s denial of the application of D. B. for a 2008 Alaska Permanent Fund dividend is REVERSED.

DATED May 7, 2009.

Signed _____
Andrew M. Hemenway
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 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 10th day of June, 2009.

By: *Signed* _____
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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

³³ House Judiciary Committee Minutes, March 27, 1996 (Tom Williams, staff to Senator Frank: “If someone was incarcerated for a third misdemeanor, this also would make someone ineligible”; Nancy Jones, director of the Permanent Fund Dividend Division: “This...program would be expanded to persons...who commit a third misdemeanor...”). See also, House Finance Committee Minutes, April 16, 1996 (Tom Williams: a technical correction “clarifies that any two prior convictions would make an individual ineligible upon the third misdemeanor convictions.”).