

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

In the Matter of	)	
	)	
T. B.	)	
	)	OAH No. 09-0001-PFD
<u>2008 Permanent Fund Dividend</u>	)	Agency No. 2008-000-1395

**DECISION**

**I. Introduction**

T. B.'s application for a 2008 permanent fund dividend (PFD) was denied because the Permanent Fund Dividend Division determined she was incarcerated during the qualifying year as a result of a misdemeanor conviction after being convicted of two or more prior misdemeanors. Following an unsuccessful informal appeal, Ms. B. requested a formal hearing. The Division's denial of Ms. B.'s application is reversed because, on the record presented, Ms. B.'s incarceration was not the result of a third misdemeanor conviction.

**II. Facts**

T. B. timely applied for a 2008 PFD. The division has raised no issue regarding her eligibility apart from her incarceration during the preceding year.

Her incarceration in 2007 related to Case No. 3XX-M05-0XXXXCR, growing out of a 2005 misdemeanor charge of driving under the influence.<sup>1</sup> Ms. B. was convicted of that charge, a Class A misdemeanor, on February 17, 2006, and sentenced to 180 days in jail, with 150 days suspended.<sup>2</sup> She was also ordered to report for counseling and placed on probation for five years. Ms. B. did not report for counseling and her probation was modified requiring that she serve a portion of the time that was previously suspended.<sup>3</sup> Ms. B. was jailed from April 23, 2007 to May 19, 2007.<sup>4</sup> Ms. B.'s conviction in Case No. 3XX-M05-0XXXXCR was her second misdemeanor conviction. Her first misdemeanor conviction for purposes of PFD eligibility occurred May 21, 1997, in Case No. 3XX-M97-2506CR.<sup>5</sup>

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<sup>1</sup> Exhibit 3 at 8 (Criminal Judgment 3XX-M05-0XXXX)

<sup>2</sup> *Id.*

<sup>3</sup> Exhibit 3 at 7 (Order To Modify Or Revoke Probation April 9, 2007).

<sup>4</sup> Exhibit 4 at 5 (Corrections Identification Verification Form for PC/80); Exhibit 4 at 9 (OTIS-WEB Search Results for Offender: 276213).

<sup>5</sup> Exhibit 3 at 6. (Criminal Judgment 3AN-M05-0XXXXCR). The statute counts prior convictions for criminal offenses committed on or after January 1, 1997. Sec. 6 ch. 46 SLA 1996 (quoted in editor's note to AS 4.23.005). Ms. B. has convictions for criminal offenses that were committed before December 31, 1996, but they do not count.

The Alaska Department of Corrections completed the division's Corrections Identification Verification Form for PC/80.<sup>6</sup> This form contains the following information related to Ms. B.:

Case No.	Charge/Conviction Date	Incarceration Date
3XX-M05-0XXXXCR	2/17/06	4/23/07-5/19/07
3XX-97-0XXXXCR	Fake Information	5/21/97 <sup>7</sup>
3XX-M05-0XXXXCR	P.T.R. 4/9/07	40 days

The form also provides an area for additional notes. That section contains the following hand written notation: "3 Misd. Conv., one in 07".<sup>8</sup>

The division denied Ms. B.'s 2008 PFD application because it believed that Ms. B.'s probation violation was her third misdemeanor. The division bases its conclusion on the Department of Corrections OTIS-WEB Search Results for Offender XXXXXX (Ms. B.) and the information provided on the verification form PC/80. The OTIS report is made up of several sections. Under the section identified as "Court Cases" The OTIS report lists the probation violation under Case No. 3XX-M05-0XXXXCR as a Class B misdemeanor and her OTIS lists her DUI as a Class A misdemeanor. Thus, the division believes Ms. B. was charged and convicted of a new misdemeanor.

Ms. B. argues that she was not charged with a new crime because her probation violation is part of the DUI conviction. Therefore, she was not convicted of a third misdemeanor offense when she was incarcerated from April 23, 2007 to May 19, 2007.

### **III. Discussion**

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

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<sup>6</sup> Exhibit 4 at 5 (Corrections Identification Verification Form for PC/80, signed November 18, 2008).

<sup>7</sup> This date is placed on the form such that it could be either the conviction or the incarceration date.

<sup>8</sup> Exhibit 4 at 5 (Corrections Identification Verification Form for PC/80, signed November 18, 2008).

more prior misdemeanors as defined in AS 11.81.900.”<sup>9</sup> The statute counts prior convictions for criminal offenses committed on or after January 1, 1997.<sup>10</sup>

The qualifying year for a 2008 dividend was 2007.<sup>11</sup> It is undisputed that since January 1, 1997, Ms. B. has been convicted of two misdemeanors. Therefore, if her 2007 incarceration was the result of a new misdemeanor conviction, she would disqualify herself from a 2008 dividend. The sole question in this appeal is whether the record supports a finding that Ms. B.’s incarceration in 2007 in connection with Case No. 3XX-M05-0XXXXCR can be said to be as a result of a third misdemeanor conviction. It does not.

The violation code associated with the OTIS entry relied upon by the division, AS 33.05.070, addresses the arrest of the probationer. It does not provide that a probation violation is a criminal offense. Simply violating probation is not a separate crime for which a judge may sentence the probationer.<sup>12</sup> A judge places a defendant on probation to see how they do, and if the defendant complies with the terms and conditions of probation, the defendant does not have to serve that time. If it does not go well and the defendant violates a term or condition of probation, the judge may revoke probation and the time served is the result of the original conviction.<sup>13</sup>

The notation on the verification form associated with the asserted third misdemeanor conviction identifies the charge as a “P.T.R.” It is reasonable to conclude that this stands for “petition to revoke.” The act which results in a violation of the terms and conditions of the probation may be a separate criminal offense and may be convicted as a separate offense. However, the evidence relied upon by the division is insufficient to establish that Ms. B. was charged with, much less convicted, of a separate misdemeanor as the result of her probation violation. Rather, the time served attributable to Ms. B.’s probation modification is, more likely than not, the sentence (or portion thereof) that the judge ordered when sentencing the defendant on the original conviction, and not associated with a third misdemeanor conviction.

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<sup>9</sup> 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.

<sup>10</sup> Sec. 6 ch. 46 SLA 1996 (quoted in editor’s note to AS 4.23.005).

<sup>11</sup> AS 43.23.095(6).

<sup>12</sup> AS 33.05.070(b); *In re P.V.*, OAH 05-0072-PFD (September 2005).

<sup>13</sup> *Id.*

**IV. Conclusion**

Ms. B.'s incarceration in 2007 was, more likely than not, attributable to her DUI conviction in Case No. 3XX-M05-0XXXXCR and not the result of a new misdemeanor conviction. Therefore she is not disqualified from a 2008 PFD on the basis of incarceration during the qualifying year as a result of a third misdemeanor conviction since January 1, 1997. The decision of the division is REVERSED.

DATED this 20<sup>th</sup> day of February, 2009.

By: Signed  
Rebecca L. Pauli  
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 20<sup>th</sup> day of March, 2009.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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