

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

In the Matter of	)	
	)	
M. D. S.	)	OAH No. 09-0029-PFD
	)	Agency No. 2008-004-6837
<u>2008 Permanent Fund Dividend</u>	)	

**DECISION & ORDER**

**I. Introduction**

M. D. S.'s application for a 2008 permanent fund dividend (PFD) was denied on the basis that he spent an excessive amount of time outside Alaska during the qualifying year while not on one of the types of absences the Legislature has deemed allowable; specifically, he was incarcerated in Oregon during his absence. At the informal appeal level, the agency maintained the denial. Mr. S. requested a formal hearing, which took place before this office on February 25, 2009. Mr. S. attended in person. At the hearing, he was well-spoken and respectful of the appeal process. He was frank about his past troubles with the law, but sought a ruling on a single legal issue relating to his entitlement to a PFD.

The denial is upheld because Mr. S.'s extended absence does not qualify as an allowable absence under the statute listing allowable absences. The Department of Revenue is bound by the rules for PFD distribution laid down by the Legislature.

**II. Facts**

Mr. S. has been an Alaskan for the last 43 of his 50 years, and apart from 2008 he has received a PFD each year since the inception of the program.<sup>1</sup> His status as a legal resident of Alaska throughout the entire period relevant to this case does not appear to be at issue.

The single issue in this case is how Mr. S. spent 2007, the qualifying year for this dividend. During that year, he was absent from Alaska a total of 281 days.<sup>2</sup>

Mr. S. spent the first 281 days of 2007 at the Federal Correction Institution in Sheridan, Oregon. He had been incarcerated late in the previous year upon conviction of six felonies and two misdemeanors. All eight convictions related to a single scheme by S., a postal employee, to steal Postage Statements that documented bulk mailings, thereby causing the Postal Service to fail to

---

<sup>1</sup> Exhibit 1, p. 1 (2008 Adult Web Application); written statement of Mr. S.

<sup>2</sup> Exhibit 1, p. 2 (2008 Adult Web Application); testimony of Mr. S.

collect revenue it was owed by its customers. (The scheme was not calculated to enrich Mr. S., but rather to harm the Postal Service in connection with employee dissatisfaction of some kind).<sup>3</sup>

On September 20, 2007, the Ninth Circuit Court of Appeals reversed the six felony convictions on the basis that the Postage Statements did not have the requisite value for their theft to be a felony.<sup>4</sup> It left intact two unappealed misdemeanor convictions growing out of the same conduct.

At the time of the Ninth Circuit ruling, Mr. S. was almost one year into a 30-month sentence. He had been sentenced to 30 months on each of the six felonies and to 12 months on each of the two misdemeanors, all of the sentences to run concurrently.<sup>5</sup> He was released upon completion of the 12-month terms a few weeks later. He returned to Alaska on about October 10, 2007 and has remained in the state since that time.<sup>6</sup>

Mr. S. asserts that if the misdemeanors had been prosecuted originally as two misdemeanors without accompanying felonies, he would have been sentenced to no more than six months in prison and he would likely have been able to serve the sentence in Alaska.<sup>7</sup> He says that the misdemeanors were given 12-month terms only because of a federal sentencing practice “of sentencing to the maximum statutory term for any ‘lesser included’ offenses being served concurrently with the primary offense.”<sup>8</sup> The evidence of these assertions is incomplete; Mr. S. has not established his own expertise to testify on these matters, and his single exhibit, a sentencing table, is not self-explanatory. The PFD Division does not directly challenge the assertions, however.

### **III. Discussion**

There is a disqualifying provision in the PFD statute for individuals incarcerated during the qualifying year “as a result of a conviction in this state of a felony.”<sup>9</sup> The disqualification does not apply, however, when all of the felony convictions leading to the incarceration are vacated or

---

<sup>3</sup> Ex. 3, pp. 5-7 (*United States v. S.*, No. 06-30498 (9<sup>th</sup> Cir. 2007).

<sup>4</sup> *Id.* at 7-11.

<sup>5</sup> Ex. 3, pp. 12-13 (trial court judgment).

<sup>6</sup> Testimony of Mr. S.; written statement of Mr. S.

<sup>7</sup> *Id.*

<sup>8</sup> Written statement of Mr. S.

<sup>9</sup> AS 43.23.005(d). The provision also disqualifies people incarcerated on account of a third misdemeanor conviction; that disqualification is irrelevant because, so far as the record shows, Mr. S. has only two misdemeanor convictions.

reversed.<sup>10</sup> The PFD Division therefore does not rely on this disqualification in the present case. Instead, the case turns only on the length of the applicant's absence from Alaska in 2007.

The qualifying year for the 2008 dividend was 2007.<sup>11</sup> In order to qualify for a Permanent Fund Dividend in 2008, the applicant had to have been physically present in Alaska all through the qualifying year, or only have been absent for one of the 17 allowable reasons listed in a statutory section entitled "Allowable Absences," AS 43.23.008.<sup>12</sup>

One of the specifically allowable absences is an absence for any reason consistent with Alaska residency. Vacations and the like fit under this absence. However, an absence for this open-ended reason cannot have exceeded 180 days under any circumstances.<sup>13</sup> Since Mr. S. was absent for 281 days, this allowable absence cannot, by itself, save his eligibility for the dividend. He would need to qualify for a second type of allowable absence as well.<sup>14</sup> There is no other absence among the 17 categories that potentially fits Mr. S., and he does not claim otherwise.

Mr. S. argues instead that his absence should not "count" as an absence because it was involuntary. The short answer to this argument is that the Legislature has not created an exception for involuntary absences, and the Department of Revenue has never read such an exception into the statute. Indeed, the Department has denied dividends to people involuntarily absent from the state under circumstances that create a strong equitable case for paying the dividend, on the ground that it simply has not been given the authority to consider the individual equities. An example is *In re R.C.H.*,<sup>15</sup> denying a dividend to a member of the military who was ordered to Iraq but, for technical reasons, could not use the allowable absence category for serving in the military. Since his absence exceeded 180 days, the serviceman was denied a dividend, even though it was only military orders that caused the extended absence. To be consistent with such prior interpretations of the statute, the Department must deny Mr. S. a dividend.

Moreover, in Mr. S.'s case the evidence simply does not establish that, but for an error of a miscarriage of justice, he would have been absent from the state for less than six months. He posits that if the prosecutor had charged him with only two misdemeanors, he would probably have received a sentence involving less than 180 days outside the state. This may well be true.

---

<sup>10</sup> See 15 AAC 23.183(b).

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

<sup>12</sup> AS 43.23.005(a)(6).

<sup>13</sup> AS 43.23.008(a)(17)(A).

<sup>14</sup> The maximum length of the catchall absence is reduced somewhat if the applicant is claiming certain other kinds of absences in the same year. See AS 43.23.008(17).

<sup>15</sup> OAH No. 07-0677-PFD (Commissioner of Revenue 2008).

However, it is also reasonable to suppose that had the prosecutor correctly perceived that the other six thefts were not felonies, they would have been charged as misdemeanors, leaving Mr. S. with, not two, but eight concurrent misdemeanor convictions. There is no evidence in the record as to how such a collection of misdemeanors would have been sentenced under the federal guidelines.

Because he spent 281 days outside Alaska in the qualifying year for the 2008 dividend, and has not carried his burden of showing that his absence was allowable, there is not a legal way to grant Mr. S. a 2008 dividend.

#### **IV. Conclusion**

Because of his extended absence, Mr. S. is not eligible for the 2008 PFD. He remained an Alaska resident, and nothing in this decision precludes him from eligibility for 2009 and future PFDs.

The decision of the Permanent Fund Dividend Division to deny the application of M. D. S. for a 2008 Permanent Fund Dividend is AFFIRMED.

DATED this 1<sup>st</sup> day of June, 2009.

By: Signed  
Christopher Kennedy  
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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 29th day of June, 2009.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Administrative Law Judge  
Title

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