

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

IN THE MATTER OF)	
)	
C. D.)	
)	OAH No. 09-0121-PFD
<u>2008 Permanent Fund Dividend</u>)	Agency No. 2008-045-2695

DECISION

I. Introduction and Procedural Background

The Permanent Fund Dividend Division denied C. D.’s application for a 2008 permanent fund dividend (PFD) after determining that Ms. D. was not eligible for that PFD because she had a disqualifying conviction in 2007. Ms. D. appealed the division’s denial arguing that her sentence was suspended and that she was not incarcerated. A hearing was held on May 18, 2009. Ms. D. participated telephonically through her social worker, J. B. PFD Specialist, Pete Scott, participated telephonically on behalf of the division.

At the hearing it was revealed by Ms. B. that Ms. D. was residing at Providence Hospital’s extended care facility and that a petition for appointment of a full guardian/conservator for Ms. D. was to be heard on July 29, 2009. The pending petition raised concerns regarding Ms. D.’s ability to adequately represent her interests in this matter or participate in the development of the full evidentiary record. To ensure due process and balance the interests of parties it was necessary to extend the statutory 120 proposed decision deadline. An Interim Order was issued keeping the record open to provide Ms. D. or her representative time to file additional documents to corroborate her belief that she was eligible for a 2008 PFD.¹ Ms. D.’s August 31, 2009 deadline passed without further submission. On September 14, 2009 the division submitted its Response to Interim Order restating its original position.

II. Facts

On November 13, 2005, Ms. D. committed the offense of Felony Driving While Intoxicated in violation of AS 28.35.030(n). She entered Anchorage Wellness Court in March of 2006 successfully completing the 18 month program on October 15, 2007.² That same day she was

¹ Interim Order Setting Filing Deadlines dated May 19, 2009.
² Exhibit it 3 at 5, 11.

convicted of Felony Driving While Intoxicated.³ Ms. D. was sentenced to 24 months with 24 months suspended and two years unsupervised probation.⁴

Ms. D. timely filed her 2008 PFD application.⁵ Her application was denied based on her felony conviction and resulting sentence. Ms. D. appealed asserting that she was incorrectly identified by the Department of Corrections as having been incarcerated in 2007 and her sentence was reversed or vacated by the court.⁶ In support of her appeal Ms. D. submitted a letter from her probation officer and certificates of completion from the Clithrow Center⁷ and the Anchorage Wellness Court.⁸ The letter from the probation officer states that upon completion of Ms. D.'s participation in Wellness Court, "the sentence against her was suspended."⁹

III. Discussion

This case is governed by AS 43.23.005(d), which states:

Notwithstanding the provisions of (a) - (c) of this section, an 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;
- (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 as defined in AS 11.81.900 ; or
 - (ii) two or more prior misdemeanors as defined in AS 11.81.900.

The qualifying year for the 2008 PFD is 2007.¹⁰ Ms. D. was sentenced, even though the sentence was suspended, on October 15, 2007 for a felony offense. A person who has successfully completed probation in an SIS (Suspended Imposition of Sentence) case is entitled to have his or her conviction "set aside." The term "set aside" comes from AS 12.55.085, the SIS statute. That statute permits courts to suspend imposition of sentence in certain cases. Subsection (e) says, "upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect." However, a person whose conviction has been

³ Exhibit 3 at 6 – 8.

⁴ *Id.*

⁵ Exhibit 1.

⁶ Exhibit 3 at 3, 4.

⁷ Clithrow Center is the Salvation Army's out patient substance abuse program. Exhibit 3 at 10.

⁸ Wellness Court is a jail diversion program. Upon successful completion, the defendant receives a reduced sentence and fines. <http://courts.alaska.gov/ancfelonydui.htm>.

⁹ Exhibit 3 at 5.

¹⁰ AS 43.23.095(6).

aside is not entitled to have his record completely cleared, or “expunged.”¹¹ “Expungement” means the complete deletion of any record of the conviction from a person’s criminal record.¹² Thus, Ms. D.’s criminal record should now show that she was convicted and was on probation at one time, but that the conviction was since set aside. The record cannot be completely deleted. Ms. D.’s felony conviction in 2007 remains on her criminal record and is a disqualifying action making her ineligible to receive a 2008 PFD.

IV. Conclusion

C. D. was sentenced in 2007 as a result of a conviction in Alaska of a felony. The decision of the division to deny Ms. D.’s application for a 2008 PFD was correct on the evidence presented and is affirmed.

DATED this 21st day of October, 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 17th day of November, 2009.

By: Signed _____
Signature
Christopher Kennedy _____
Name
Administrative Law Judge _____
Title

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

¹¹ *Journey v. Alaska*, 895 P.2d 955 (Alaska 1995).
¹² Black’s Law Dictionary 522 (5th ed. 1979).