

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

IN THE MATTER OF)	
)	
D. A. F.)	
)	OAH No. 09-0235-PFD
<u>2008 Permanent Fund Dividend</u>)	Agency No. 2008-036-2232

DECISION

I. Introduction

D. A. F.'s application for a 2008 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 Mr. F. ineligible. Following an unsuccessful informal appeal Mr. F. requested a formal hearing which was held June 1, 2009.¹ Mr. F. participated by telephone as did the division's representative, PFD Specialist Peter Scott. The evidence established that the division's denial should be affirmed because Mr. F. did have a disqualifying incarceration during 2007, the qualifying year for the 2008 PFD.

II. Facts

The division initially denied Mr. F.'s 2008 PFD on July 23, 2008 because the Department of Corrections (DOC) identified him as having been incarcerated throughout 2007, the qualifying year for the 2008 PFD as the result of a felony conviction.² The denial does not provide a case number to identify the disqualifying conviction.

To understand the disqualifying incarceration it is necessary to understand Mr. F.'s criminal history related to his incarceration in 2007. The relevant convictions are Mr. F.'s felony conviction in 3KN-S-03-0000CR (the Kenai conviction) and his conviction for one misdemeanor count and one felony count in 3HO-SO5-000CR (the Homer conviction).

When Mr. F. committed the offenses which are the basis of the Homer conviction he was on probation for the Kenai conviction which was subsequently revoked on a Petition to Revoke

¹ A supplemental hearing was held June 19, 2009. The record remained opened until July 17, 2009 to provide the parties with an opportunity to fully develop the evidentiary record. The division submitted the Department of Corrections time Accounting Record for Mr. F. and its supplemental position paper. Mr. F. submitted several responsive emails.

² Exhibit 3 at 1 (July 23, 2008 Denial Letter).

Probation (PTRP).³ The Homer conviction resulted in concurrent sentences (six months for the misdemeanor and two years for the felony) and the PTRP resulted in Mr. F. serving the remaining 20 months of suspended jail time associated with his Kenai conviction – sentences to run consecutively. This resulted in Mr. F. being sentenced to serve a total of three years and eight months. His sentence for the Homer conviction began for purposes of the Department of Corrections Time Accounting Record (TAR) on October 13, 2005, when Mr. F. was remanded into custody.⁴

Mr. F. appealed his Homer convictions. The Alaska Court of Appeals reversed his Homer felony conviction on November 26, 2008.⁵ Two months later, Mr. F. appealed the denial of his 2008 PFD application.

Mr. F. believed he was entitled to a 2008 PFD because the felony for which he was incarcerated in 2007, the Homer felony conviction, was reversed. Mr. F. reasoned that had he been sentenced to serve six months for the misdemeanor conviction he would have been paroled in 2006. Presumably Mr. F. did not consider whether his dividend would be denied as a result of the imposition of previously suspended jail time associated with the Kenai felony because he was serving time in 2007 for the Homer conviction, not his Kenai conviction.⁶

When the division received Mr. F.'s informal appeal it asked the DOC to verify that Mr. F. was correctly identified as having been incarcerated in 2007. The DOC did verify that Mr. F. was incarcerated in 2007 as the result of the felony Homer conviction.⁷ The verification form does not reference the Kenai conviction. Relying upon the DOC verification, the division denied Mr. F.'s informal appeal.

Mr. F. then filed this formal appeal restating his argument presented in support of his informal appeal. Again, neither Mr. F. nor the division addresses the time served for the Kenai felony.

On the eve of the supplemental hearing the division submitted evidence of Mr. F.'s Kenai felony conviction and now asserts that Mr. F. is ineligible for a 2008 PFD because he was

³ This was the third PTRP on the Kenai Conviction. The original sentence was 48 months with 31.5 suspended and four years probation. The first PTRP resulted in five months jail time and 26.5 months suspended. The second PTRP resulted in 6.5 months jail time and 20 months suspended. Therefore, at the time of his third PTRP he had 20 months remaining to be served.

⁴ Exhibit 19.

⁵ *F. v. State*, No. A-9779 (Alaska Ct. App. Nov. 26, 2008).

⁶ Exhibit 5.

⁷ Exhibit 6 at 5.

incarcerated during the qualifying year as a result of the Kenai felony conviction. The record remained open to receive the DOC Time Accounting Record (TAR) for Mr. F.⁸ The TAR does not indicate how the DOC accounted for time served once the Homer felony conviction was reversed.

III. Discussion

Mr. F. challenges whether his incarceration in 2007 was disqualifying. AS 43.23.005(d) provides that:

an individual is not eligible for a permanent fund dividend for a dividend year when

...

(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 11.81.900.⁹

The qualifying year for a 2008 dividend was 2007.¹⁰ Mr. F. was originally incarcerated in 2007 as a result of his Homer convictions, one of which was later reversed. Therefore, his argument that for purposes of PFD eligibility, any incarceration associated with that reversal should not be considered a disqualifying incarceration is correct.¹¹

Mr. F. then goes a step further and reasons that if he had not been sentenced for the Homer felony he would have been sentenced to serve six months for the Homer misdemeanor conviction. This sentence would have resulted in only four months served after he was credited for “good time” and he would not have been incarcerated in 2007.¹² Mr. F.’s argument fails because he does not account for the 20 months to be served consecutively for the Kenai felony.

Mr. F. was sentenced to serve 20 months for the Kenai felony conviction and 6 months for the Homer misdemeanor conviction. These sentences are to run concurrently and result in a total term of imprisonment of 26 months. An inmate’s mandatory parole release date which is based on

⁸ Exhibit 19.

⁹ 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).

¹⁰ AS 43.23.095(6).

¹¹ 15 AAC 23.183(b).

¹² By statute, a prisoner may have his time served reduced by 1/3rd for “good time.” AS 33.20.030; AS 33.20.010.

accumulated good time is derived from the total length of the inmate's term of imprisonment rather than each sentence.¹³ Accordingly, to determine whether Mr. F. had a disqualifying incarceration in 2007 it is necessary to calculate his mandatory parole date based on a 26 month term of imprisonment beginning October 13, 2005.¹⁴

Twenty-six months from October 13, 2005 is December 13, 2007 or 792 days (including the end date). When credited for good time, Mr. F. would have served 528 days which would give Mr. F. a mandatory parole date of March 25, 2007.¹⁵ It makes no difference under the facts of this case whether you count the misdemeanor time as served before or after the Kenai felony time. If served before, then Mr. F. was incarcerated during the qualifying year for a felony conviction, a disqualifying incarceration under AS 43.23.005(d)(2)(A). If served after, then Mr. F. was incarcerated during the qualifying year as the result of a misdemeanor after having been convicted of a prior felony, a disqualifying incarceration under AS 43.23.005(d)(2)(B)(i). Therefore, Mr. F. had a disqualifying incarceration in 2007 and he is not eligible for a 2008 PFD.

IV. Conclusion

Mr. F.'s incarceration in 2007 disqualifies him from a 2008 PFD. Therefore, the decision of the Permanent Fund Dividend Division to deny the application of D. A. F. for a 2008 permanent fund dividend is AFFIRMED.

DATED this 28th day of July, 2009.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

¹³ *Callen v. State*, 904 P.2d 856 (Alaska 1995).

¹⁴ Mr. F.'s time served commenced when he was remanded into custody. Exhibit 19.

¹⁵ 792 days / 3 = 264 days. 264 days x 2 = 528 days to serve when credited with good time.

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 25th day of August, 2009.

By: Signed
Signature
Virginia Blaisdell
Name
Director, Administrative Services Division
Title

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