

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

IN THE MATTER OF)
)
 A. M.)
) Case No. OAH 09-0629-PFD
)
2009 Permanent Fund Dividend)

DECISION

I. Introduction

A. M. timely applied for a 2009 permanent fund dividend. The Permanent Fund Dividend Division (“the division”) determined that Mr. M. was not eligible, and it denied the application initially and at the informal appeal level. Mr. M. requested a formal hearing by written correspondence only.

Review of the written record shows that Mr. M. is not eligible for a 2009 dividend.

II. Facts

Mr. M. was convicted of second degree murder in Alaska in 1982 and has been incarcerated ever since as a result of that conviction. Since 1995 Mr. M. has been housed in a facility out of Alaska. Mr. M. has stated that he has always maintained the intent to return to Alaska to remain indefinitely. The division denied Mr. M.’s application on the grounds that he was no longer an Alaska resident, and because he was incarcerated during part of the qualifying year as the result of a felony conviction.

III. Discussion

A person is not eligible for a permanent fund dividend if the person was incarcerated during part of the qualifying year as the result of a felony conviction.¹ In his appeal, Mr. M. wrote that “I have not legally denounced my Alaska residency and taking my Alaska PFD is Double Jeopardy.”²

Whether an administrative action constitutes double jeopardy is an issue that has been addressed by the Alaska Supreme Court. In the context of professional licenses, the court has held that

In Alaska, revoking or suspending a professional license is not “punishment” for double jeopardy purposes when it furthers a regulatory goal. In *State v. Zerkel*, the Alaska Court of Appeals held that administratively revoking a driver's license for refusing to submit to a blood alcohol test did not constitute punishment for double jeopardy purposes. The court there observed that “[a] person who loses a professional license in an administrative

¹ AS 43.23.005(d).

² Exhibit 5, page 2.

proceeding is not subjected to ‘punishment’ for double jeopardy purposes, even though the revocation or suspension is based on misconduct that could be or has been prosecuted as a criminal offense.” The court recognized that professional license revocation does not punish the licensee, but rather serves the regulatory goal of protecting the public from unfit practitioners.

We later observed in *State v. Niedermeyer* that administrative revocation or suspension of a professional license “can legitimately serve to deter conduct and still remain ‘remedial’ for double jeopardy purposes so long as the revocation or suspension is based on conduct that bears a direct relation to the government’s regulatory goals or to the proper administration and enforcement of the regulatory scheme.”³

The statute that makes a person ineligible for a dividend if the person was incarcerated as the result of a felony the previous year is AS 43.23.05(d). Addressing this statute specifically in *State v. Anthony*, the Supreme Court held that the statute is not a punitive statute in the context of a claim that the law was an ex post facto law:

In the absence of any evidence that the intent or effect of AS 43.23.005(d) is punitive, we conclude that the application of the statute to felons convicted of crimes committed prior to the statute's effective date is not ex post facto.^[4]

In *Hertz v. Storer*, the Supreme Court extended the reasoning of *Anthony* and adopted the following holding of the Superior Court:

Appellant also raises some slightly different challenges in this appeal. Appellant argues that the denial of his 1993 PFD subjects him to double jeopardy since it is a separate punishment in addition to his sentence of 40 years for murder. In *Anthony II*, the Alaska Supreme Court found that denial of a PFD [under] AS 43.23.005(d) was not a criminal punishment for purposes of the ex post facto clause. It follows that appellant's argument that he is being subjected to increased punishment, and therefore to double jeopardy, is invalid.^[5]

Thus, the denial of Mr. M.’s 2009 permanent fund dividend is not a punitive action that would constitute double jeopardy for the criminal act underlying his incarceration.

IV. Conclusion

Mr. M. was incarcerated during the qualifying year as the result of a felony conviction and is therefore ineligible for a 2009 dividend. Denial of his application for a permanent fund dividend

³ *Wendte v. State, Board of Real Estate Appraisers*, 70 P.3d 1089, 1094 (Alaska 2003)(cites omitted).

⁴ *State v. Anthony*, 816 P.2d 1377 Alaska (1991).

⁵ *Hertz v. Storer, Dep't. of Revenue, Permanent Fund Division*, 943 P.2d 725 (Alaska 1997)(cites omitted).

under AS 43.23.005(d) does not constitute double jeopardy. Because Mr. M. is ineligible for a 2009 dividend as a matter of law, it is not necessary to determine whether he has retained Alaska residency.

DATED this 26th day of January, 2010.

By: Signed
DALE WHITNEY
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 24th day of February, 2010.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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