

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

In the Matter of: )  
 )  
S. R. H. )  
 )  
 ) OAH No. 09-0675-PFD  
2009 Permanent Fund Dividend ) Agency No. 2009-048-3294

**DECISION AND ORDER**

**I. Introduction**

The Permanent Fund Division (Division) denied Mr. H.’ 2009 Permanent Fund Dividend (PFD) application. The denial was based on AS 43.23.005(d)(2)(A) which provides that an individual is not eligible to receive a PFD if he is incarcerated as a felon during any part of the qualifying year. Mr. H.’ informal appeal was denied by the Division. He has now requested a Formal Appeal. Because AS 43.23.005(d)(2)(A) is not an *ex post facto* law as applied to Mr. H., he is not eligible to receive the 2009 PFD.

**II. Facts**

It is undisputed that Mr. H. is a convicted felon who was incarcerated as a result of a felony conviction during the qualifying year. His status as an incarcerated felon is the only basis asserted for the denial of his PFD application.

**III. Discussion**

Mr. H. asserts that AS 43.23.005(d)(2)(A) is an *ex post facto* law because it increases the punishment for the crime he was convicted of. This argument has been rejected before.<sup>1</sup> Mr. H. argues, however, that recent changes in statute have converted AS 43.23.005(d) into a punitive statute. According to Mr. H., since the previous decision was based on the premise that the statute was not punitive, and since new statutes now use the denial of a PFD as additional punishment, these changes supersede the earlier court decision.

The Alaska Supreme Court reviewed AS 43.23.005(d) and held:

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*.<sup>2</sup>

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<sup>1</sup> *Hertz v. Storer*, 943 P.2d 725, 726 (Alaska 1997).

<sup>2</sup> *State v. Anthony*, 816 P.2d 1377, 1379 (Alaska 1991).

Mr. H. argues that the decision in *Anthony* has been superseded by legislative action. He cites several statutes. The first, AS 43.23.021, provides for delayed PFD payment to sex offenders and child kidnappers who do not comply with the registration requirements of AS 12.63.<sup>3</sup> Mr. H. also asserts that a PFD is denied as a penalty for minors who consume alcohol, furnishing minors with alcohol, and taking alcohol into a dry village.<sup>4</sup> Finally, he asserts that a PFD is denied to persons found incompetent to be tried for certain criminal offenses.<sup>5</sup>

It may be that AS 43.23.021 would be considered an *ex post facto* law if applied to a sex offender or child kidnapper convicted prior to January 1, 2009. Similarly, new statutes denying a PFD for certain alcohol violations or to persons incompetent to stand trial might be considered *ex post facto* as applied to previously convicted or incarcerated individuals. None of this is relevant to Mr. H.'s situation, however, as he was convicted on an entirely different charge.<sup>6</sup>

The penalty imposed on Mr. H. for the crime he was convicted of was not increased by the changes to the law referred to by Mr. H. Mr. H. is not ineligible because he is an unregistered child kidnapper. He is ineligible to receive a PFD because he is an incarcerated felon.<sup>7</sup> That a PFD may be taken from different individuals as a penalty does not mean the intent or effect of AS 43.23.005(d) is punitive.

#### **IV. Conclusion**

The Alaska Supreme Court has previously ruled against Mr. H. on the issue he raises, and the newly adopted statutes he cites do not change that result. Accordingly, the Division's denial of Mr. H.' PFD application is affirmed.

DATED this 5<sup>th</sup> day of February, 2010.

By: Signed  
Jeffrey A. Friedman  
Administrative Law Judge

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<sup>3</sup> AS 43.23.021 became effective January 1, 2009.

<sup>4</sup> Mr. H. does not cite the applicable statutes, but it is assumed for purposes of this decision that he is correctly characterizing the law in this area.

<sup>5</sup> Again, Mr. H. does not cite the statute.

<sup>6</sup> The record indicates that he was convicted of murder in 1984. Exhibit 4, page 1.

<sup>7</sup> AS 43.23.005(d)(2)(A).

## 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 5th day of March, 2010.

By: Signed  
Signature  
Jeffrey A. Friedman  
Name  
Administrative Law Judge  
Title

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