

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

In the Matter of:	)	
	)	
E. R.	)	
	)	OAH No. 10-0063-PFD
<u>2009 Permanent Fund Dividend</u>	)	Agency No. 2009-048-4645

**DECISION AND ORDER**

**I. Introduction**

E. R. applied for a 2009 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (Division) denied his application because he had been incarcerated during the 2008 qualifying year. Mr. R. completed the informal appeal process and requested a Formal Appeal.

A hearing was held on March 16, 2010. Mr. R. appeared in person. The Division was represented by Mr. Peter Scott, who appeared by phone. The division's decision denying his application for a 2009 PFD is upheld because Mr. R. was incarcerated during the qualifying year.

**II. Facts**

Mr. R. was convicted for a misdemeanor on November 30, 2007. This was his third misdemeanor conviction since January 1, 1997.<sup>1</sup> Mr. R. testified that he was not incarcerated for this conviction during 2007. Instead, he served his jail time in 2008. Mr. R. testified that he was not told that serving his time in 2008 would affect his eligibility for a 2009 PFD. Mr. R.' application for a 2008 PFD had also been denied. He testified that he did not appeal that denial because he had been convicted of a misdemeanor during the qualifying year and believed that the conviction during 2007 made him ineligible to receive a 2008 PFD.

**III. Discussion**

An otherwise eligible individual is not entitled to receive a PFD if

- (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

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<sup>1</sup> Exhibit 3, page 3.

- (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.<sup>2</sup>

There is no dispute in this case that Mr. R. had been convicted of two prior misdemeanors when, on November 30, 2007, he was convicted of an additional misdemeanor. Thus, the strict application of AS 43.23.005(d)(2)(B)(ii) to Mr. R.' situation makes him ineligible to receive a 2009 PFD. This is because he was incarcerated for several days during 2008 as a result of the 2007 misdemeanor conviction.

Mr. R. argues strongly that this strict application is unfair in his situation. He believes he should only have been denied one PFD as a result of his 2007 conviction. He argues that denial of two PFDs results in two punishments for a single crime. He also has provided evidence that the denial of the 2008 PFD was a mistake by the state since he was not actually incarcerated during that year. The Division concedes that Mr. R. might have had a valid appeal point if he had appealed the 2008 decision, but that the time for an appeal has expired.<sup>3</sup>

There are at least two potential mistakes concerning the 2008 PFD. Mr. R. mistakenly believed it was the conviction date rather than the incarceration date that controlled whether he would be eligible to receive a 2008 PFD. Based on Mr. R.' testimony that he was not incarcerated during 2007, the Division may also have made a mistake in denying that PFD.

Government employees are just as capable of making mistakes as anyone else. The purpose of an appeal process is to provide an opportunity to give the government notice that the appealing party believes a mistake has occurred. The appeal process then provides for an orderly method of correcting any mistake that may have occurred. While Mr. R. believes he should not be required to initiate the appeal when it was the state's initial mistake that caused the denial of his 2008 PFD, the applicable statutes and regulations do in fact place that burden on him. Unless he initiates an appeal, there is no reason for the PFD Division to go back and look at the paperwork to determine whether a mistake has occurred.

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<sup>2</sup> Alaska Statute AS 43.23.005(d)

<sup>3</sup> The Division does not concede that his appeal would have been successful as it has not had an opportunity to investigate or respond to any reasons that would have been asserted in an appeal.

Appeals must be filed within 30 days unless the individual demonstrates reasonable cause for the failure to file within this period.<sup>4</sup> Mr. R. has not filed an appeal concerning the 2008 PFD, and this opinion does not express any view as to whether there is reasonable cause to excuse timely filing or whether any appeal would be successful. Procedurally, those decisions cannot be made unless an appeal of the 2008 PFD decision is actually filed. Accordingly, this opinion resolves only the appeal of the 2009 PFD denial.

Alaska Statute 43.23.005(d) does not allow the Division any discretion. The Division is required to follow the statute as written. A person who is incarcerated during the qualifying year is not eligible for a PFD if that incarceration was for a misdemeanor and the individual had two or more prior misdemeanor convictions.

#### **IV. Conclusion**

The decision by the Permanent Fund Dividend Division denying Mr. R. a 2009 PFD is upheld because he was incarcerated during 2008.

DATED this 17<sup>th</sup> day of March, 2010.

By: Signed  
Jeffrey A. Friedman  
Administrative Law Judge

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<sup>4</sup> Alaska Regulation 15 AAC 05.010(b)(5). *See also*, 15 AAC 05.030(k) (Strict adherence to deadlines may be waived by a hearing officer to avoid injustice.); *In the Matter of J.J.G.*, OAH No. 09-0363-PFD; *In the Matter of D.S.*, OAH No. 09-0033-PFD.

## 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 13<sup>th</sup> day of April, 2010.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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