

charge.⁷ On May 2, Mr. K. walked away from Cordova House and was charged with escape in No. 3AN-09-04911-CR; he was returned to custody and again jailed later that same day.⁸

On June 16, Mr. K.'s two pending misdemeanor cases were heard in court. Mr. K. plead guilty to assault in the fourth degree (No. 3 AN-09-01553-CR, AS 11.41.230(a)(1))⁹ and escape (No. 3AN-09-04911-CR, AS 11.56.330(a)).¹⁰ In the assault case Mr. K. was sentenced to serve 180 days in jail, with 150 days suspended.¹¹ In the escape case he was sentenced to serve 360 days in jail, with 320 days suspended.¹² He was credited with time served and was discharged from custody on the date of the convictions.¹³

Mr. K. was not in custody from June 17 through December 2, 2009.¹⁴ Mr. K. was charged on December 3, 2009, with possession of a controlled substance (No. 3AN-09-13902-CR).¹⁵ He was jailed on that charge that same day.¹⁶ Mr. K. remained in jail through April 6, 2010, when he was convicted on the controlled substances charge, sentenced to 360 days with 240 days suspended, credited with the time served since December 3, and released from custody.¹⁷

III. Discussion

AS 43.23.005(d)(2)(B) provides that an individual is ineligible for an Alaska Permanent Fund dividend if during the qualifying year, “the individual was incarcerated as a result of the conviction in this state of a...misdemeanor if the individual has been convicted of...(ii) two or more prior misdemeanors as defined in AS 11.81.900.” AS 11.81.900 (b)(37) defines a misdemeanor as a crime¹⁸ “for which a sentence of imprisonment for a term of more than one year may not be imposed.”

The qualifying year for the 2010 dividend was 2009. Thus, Mr. K. is disqualified from eligibility for the 2010 dividend if he was incarcerated in 2009 as a result of conviction in Alaska

⁷ Ex. 5, p. 2; Ex. 7, p. 41.

⁸ Ex. 5, p. 2; Ex. 7, p. 35.

⁹ Ex. 7, pp. 25, 36-42.

¹⁰ Ex. 7, pp. 26, 33-35.

¹¹ Ex. 7, pp 36-37.

¹² Ex. 7, p. 33.

¹³ Ex. 5, p. 2.

¹⁴ Ex. 5, p. 2.

¹⁵ See Ex. 7, pp. 27-32.

¹⁶ Ex. 5, p. 1; Ex. 7, p. 32.

¹⁷ Ex. 5, p. 2; Ex. 7, p. 27-28.

¹⁸ A “crime” is defined as an offense for which a sentence of imprisonment is authorized. AS 11.81.900(b)(11).

of a misdemeanor, and he had been convicted of two or more prior misdemeanors. Mr. K.'s appeal documents do not assert that AS 43.23.005(d) does not apply to him under the facts of this case. Rather, they assert that he is a United States citizen and a resident of Alaska, and that he needs assistance in obtaining his Alaska Permanent Fund dividend because he has a mental health condition.¹⁹ The record establishes, and Mr. K. does not dispute, that he has two misdemeanor convictions from prior to 2009. Moreover, the record establishes, and Mr. K. does not dispute, that he was in custody for substantial periods of time in 2009. What remains to be seen is whether during those periods he was in custody as a result of an Alaska misdemeanor conviction.

A. January 1-March 28 Federal Custody

The record indicates that from January 1-March 28, 2009, Mr. K. was in federal custody on an immigration charge. There is no evidence in the record that during this time he was incarcerated as a result of an Alaska criminal conviction.

B. March 28-June 16 Incarceration

Mr. K. was charged with criminal mischief, a misdemeanor, on February 11, 2009, while he was still in federal custody on the immigration charge. He was remanded to state custody because of the February misdemeanor charge on March 28. He walked away from Cordova house and was charged with misdemeanor escape on May 3, 2009. Mr. K. was convicted on the two 2009 misdemeanor charges on June 16, 2009, at which time he was credited with time served and released.

Whether a period of incarceration that occurs before a conviction may be deemed a result of the later conviction is a question that has been raised previously. The commissioner has concluded that for purposes of AS 43.23.005(d), time served prior to a conviction that is credited to that conviction is deemed to have been served beginning on the date of the conviction.²⁰ Mr. K.'s incarceration from March 28-June 16 is therefore properly characterized as a "result" of the June 16 conviction even though, but for a few moments on June 16, 2009, between his conviction and his release, the period of incarceration occurred before the conviction.²¹

¹⁹ Ex. 3, p. 2; Ex. 6, p. 2.

²⁰ In Re J.G.H., OAH No. 0164-PFD (Commissioner of Revenue 2008); In Re A.P., OAH No. 07-0343-PFD (Commissioner of Revenue 2007). This issue was the subject of an Alaska Supreme Court decision in 1991. *See State v. Anthony*, 810 P.2d 155, 162 (Alaska 1991).

²¹ *See, e.g., In Re L.N.*, OAH No. 08-0662-PFD (Commissioner of Revenue 2009).

Accordingly, Mr. K. was incarcerated in 2009 as a result of an Alaska misdemeanor conviction, and he had two prior misdemeanor convictions.

C. December 3-31, 2009 Incarceration

Mr. K. was jailed from December 3, 2009, through the end of the year, and continuing until April 6, 2010. The Department of Corrections' report to the division lists that time as credited to the 2009 misdemeanor escape charge,²² and lists the time served from March 28, 2009, through June 16, 2009, as credited to the December, 2009, controlled substances charge (for which Mr. K. was convicted in 2010).²³

The Department of Corrections' entries are transposed: Mr. K.'s incarceration from March 28-June 16, 2009, was actually credited to the June 16, 2009 criminal mischief and escape convictions, and the December 3-31, 2009, incarceration was credited to the 2010 controlled substances conviction.²⁴ Mr. K.'s incarceration from December 3-31 on the controlled substances charge does not count as a disqualifying period for the 2010 dividend, because it was credited as time served on a conviction that occurred in 2010.²⁵

IV. Conclusion

Mr. K. was incarcerated in 2009, the qualifying year for the 2010 Alaska Permanent Fund dividend, as a result of an Alaska misdemeanor conviction, and he had two misdemeanor convictions prior to 2009. He is therefore ineligible for the 2010 dividend. The division's denial of his application is AFFIRMED.

DATED February 23, 2011.

Signed

Andrew M. Hemenway
Administrative Law Judge

²² Ex. 5, p.1.

²³ Ex. 5, p.1.

²⁴ See notes 12, 16, *supra*. If the December time served had been credited to the 2009 convictions, there would have been a probation revocation proceeding; the period of incarceration would, in that situation, have properly been attributed to the 2009 conviction. See generally, *In Re D.B.*, OAH No. 08-0697-PFD (Commissioner of Revenue 2009).

²⁵ *In Re A.P.*, OAH No. 07-0343-PFD (Commissioner of Revenue 2007). See note 20, *supra*.

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 6th day of April, 2011.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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