

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

In the Matter of)
)
C. A. A.)
)
2010 Permanent Fund Dividend) OAH No. 10-0540-PFD
 Agency No. 2010-038-4500

DECISION

I. Introduction

C. A. A.'s application for a 2010 permanent fund dividend (PFD) was denied because he was incarcerated during the qualifying year as a result of his third misdemeanor conviction. Following an unsuccessful informal appeal, a formal hearing was held November 29, 2010. At Mr. A.'s request, the record remained open to December 30, 2010 because he wanted an opportunity to obtain court records he believed would support his appeal. Mr. A. was unable to obtain the records and the record closed. Both Mr. A. and the division provided closing briefs.

The Division's denial is affirmed because Mr. A. was incarcerated during part of the qualifying year as the result of a third misdemeanor conviction and he is, therefore, ineligible for a 2010 PFD.

II. Facts

Mr. A. timely applied for a 2010 PFD. The division has raised no issue regarding Mr. A.'s eligibility apart from his incarceration during the qualifying year, 2009.

Mr. A. agrees that he has three misdemeanor convictions in Alaska:

Case No.	Charge/Conviction Date
4FA-01-04003CR	DWI ¹ 2/15/02
4 FA-04-01671CR	DWLC/S/R/L ² 9/27/05
4FA-05-04251CR	DWI 3/2/06 DWLC/S/R/L 3/2/06

He also agrees that he was incarcerated in 2009. He does not agree that the incarceration was attributable to his third misdemeanor offense. Mr. A. argued that the incarceration was for a previously dismissed charge and a nonexistent probation violation.

To resolve Mr. A.'s appeal it is necessary to look at the sentence imposed by the court in March 2006 and Mr. A.'s criminal record since the sentence was imposed.

¹ Driving While Intoxicated (DWI).

Mr. A.'s 2005 criminal case resulted in two convictions. For the DWI conviction, the court fined Mr. A. \$4,000, sentenced to 360 days in jail with 270 suspended, and five years probation.³ For his DWLC conviction, the court sentenced Mr. A. to 120 days in jail with 90 days suspended and five years probation.⁴ A judge places a defendant on probation to see how they do, and if the defendant complies with the terms and conditions of probation, the defendant does not have to serve that time. If it does not go well and the defendant violates a term or condition of probation, the judge may revoke probation and the time served is the result of the original conviction.⁵

On July 23, 2006, court records indicate Mr. A. was charged with another DWI in case number 4FA-06-02731CR (2006 case).⁶ This charge also resulted in re-opening of his 2005 case by the State filing a Petition to Revoke Probation (PTRP).⁷ As reflected in the Log Notes of the August 1, 2006 proceeding provided by Mr. A., an agreement was reached where 2006 case was dismissed and he was sentenced to serve 90 days of the previously suspended time in the 2005 case.⁸ This left Mr. A. with 180 days of suspended time remaining on his sentence for his 2005 case.⁹

In 2008, for reasons not apparent in the record, the court issued a warrant for Mr. A.'s arrest in connection with the 2005 case.

On August 15, 2009, Mr. A. was arrested and incarcerated for 13 days awaiting sentencing action on another PTRP filed in his 2005 case.¹⁰

The Court granted the State's PTRP and issued an Order Modifying/Continuing Probation and sentencing Mr. A. to serve 90 days of the remaining 180 days on his 2005 case¹¹ unless prior to November 1, 2009, the date Mr. A. was to report to jail, he provided proof of compliance with alcohol assessment.¹² Mr. A. elected to do neither and a warrant was issued for his arrest. On April 19, 2010, Mr. A. was arrested and remained incarcerated through June 4,

² Drive While License Canc/Susp/Revoked/Limited (DWLC/S/R/L).

³ Exh. 5 at 8, 9.

⁴ *Id.*

⁵ AS 33.05.070(b); *In re P.V.*, OAH 05-0072-PFD (September 2005).

⁶ http://www.courtrecords.alaska.gov/pa/pa.urd/pamw2000.o_case_sum?30469387

⁷ Exh. 5 at 8.

⁸ Exh. 9 at 6.

⁹ 270 days – 90 days = 180 days. In this instance it makes no difference if the suspended time for each 2005 conviction runs concurrently or sequentially.

¹⁰ Exh. 5 at 1; Exh. 8.

¹¹ Exh. 9 at 1.

¹² Exh. 5 at 5.

2010 under the sentence imposed in the 2005 case. A review of the Department of Correction's Time Accounting Record establishes that Mr. A. was released on June 4, 2010 after receiving a reduction for good time and credit for the time served in 2009.¹³

III. Discussion

The Alaska legislature has directed that "an individual is not eligible for a permanent fund dividend for a dividend year when . . . during all or part of 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 . . . (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."¹⁴ The statute counts prior convictions for criminal offenses committed on or after January 1, 1997.¹⁵

The qualifying year for a 2010 dividend was 2009.¹⁶ Mr. A. has been convicted of three misdemeanors since January 1, 1997. Therefore, if his 2009 incarceration was the result of the third misdemeanor conviction, he would disqualify himself from a 2010 dividend. The sole question in this appeal is whether the record supports a finding that Mr. A.'s incarceration in 2009 can be said to be as a result of a third misdemeanor conviction. The record supports such a finding.

The evidence establishes Mr. A. was sentenced in 2009 to serve 90 days of his suspended sentence imposed in his 2005 case. He served 13 days in 2009 while awaiting sentencing. He served the remaining time in 2010. The Time Accounting record establishes that Mr. A. received credit in his 2005 case for the time served in 2009. Therefore, Mr. A. was incarcerated in 2009 as a result of the third misdemeanor conviction and he should not be eligible for a 2010 PFD.

//

//

¹³ Exh. 8 at2.

¹⁴ AS 43.23.005(d). The two definitions from Title 11 simply specify that misdemeanors are crimes for which sentences greater than one year cannot be imposed, while felonies are crimes for which such sentences can be imposed.

¹⁵ Sec. 6 ch. 46 SLA 1996 (quoted in editor's note to AS 4.23.005).

¹⁶ AS 43.23.095(6).

IV. Conclusion

Ms. A.'s incarceration in 2009 was, more likely than not, attributable to his third misdemeanor conviction in Case No. 3FA-M05-04251CR. Therefore, he is not eligible to receive a 2010 PFD because of his incarceration during the qualifying year as a result of a third misdemeanor conviction since January 1, 1997. The decision of the division is AFFIRMED.

DATED this 24th day of January, 2011.

By: Signed
Rebecca L. Pauli
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 22nd day of February, 2011.

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

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