

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

In the Matter of:)	
)	
B Q)	
)	OAH No. 11-0455-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-029-6880

DECISION

I. Introduction

The Permanent Fund Dividend Division (division) denied Mr. Q’s 2011 Permanent Fund Dividend (PFD) application because, under AS 43.23.005(d)(2), an individual is not eligible to receive a PFD if, during any part of the qualifying year, the applicant was incarcerated as the result of a felony conviction. Mr. Q was convicted of his felony offense prior to the effective date of AS 43.23.005(d)(2) and contends that it cannot apply to him, because to do so would be unconstitutional as it would result in an *ex post facto* law.¹ However, other individuals in Mr. Q’s position have argued this and the Alaska Supreme Court has consistently held that when applied to an incarcerated felon convicted prior to the effective date of relevant amendment to the statute, January 1, 1997, AS 43.23.005(d) is not an unconstitutional *ex post facto* law.²

Mr. Q challenged the division’s denial and requested a formal appeal by correspondence. The parties were provided an opportunity to submit additional argument or evidence. The division submitted its Formal Hearing Position Statement. Mr. Q did not submit any additional documents or argument beyond what he had already provided with his application for formal appeal. Because it is undisputed that Mr. Q was incarcerated in the qualifying year, 2010, as a result of a felony conviction, he is not eligible to receive the 2011 PFD.

II. Facts

It is undisputed that Mr. Q is a convicted felon who was incarcerated as a result of a felony conviction during the qualifying year for the 2011 PFD, 2010.³ His conviction occurred well before December 31, 1996, the effective date of the amendment at issue.

¹ AK Const. Art. 1, § 15 (“No . . . *ex post facto* law shall be passed”). *Ex post facto* prohibitions apply to criminal statutes and preclude the legislature from enacting a law that makes an act criminal that was not criminal when the act was done or makes more burdensome the punishment for a crime after the crime is committed. See *Doe v. State*, 189 P.3d 999, 1003 (Alaska 2008); *State v. Anthony*, 816 P.2d 1377, 1378 (Alaska 1991).

² *State v. Anthony*, 816 P.2d 1377, 1379 (Alaska 1991); *Hertz v. Storer*, 943 P.2d 725, 726 (Alaska 1997).

³ AS 43.23.095(6).

His status as an incarcerated felon is the primary basis asserted for the denial of his PFD application. However, the division asserted that Mr. Q's application should also be denied because it is incomplete. Because Mr. Q is ineligible as a matter of law, and his application is denied on this basis, it is unnecessary to address the completeness of his application.

III. Discussion

It is unconstitutional for the legislature to enact a law that makes more burdensome the punishment for a crime after the crime is committed.⁴ To understand why the amendment to AS 43.23.005(d) is not unconstitutional it is important to look at the statute pre 1997 amendment and post 1997 amendment. Prior to the passage of the amendment in question, AS 43.23.005(d) read:

. . . an individual who has been convicted of a felony is not eligible for a permanent fund dividend for a year when, during all or part of the previous calendar year, as a result of the conviction the individual is incarcerated.⁵

After it was amended effective January 1, 1997, AS 43.23.005(d) read:

. . . an individual is not eligible for a permanent fund dividend for a dividend year when

. . .

(2) during all or part of the calendar year immediately preceding that dividend year, the individual was incarcerated as a result of the conviction in this state of a

(A) felony; or

(B) misdemeanor if the individual has been convicted of two or more prior crimes as defined in AS 11.81.990.⁶

Under either the pre-amended version or the amended version of AS 43.23.005(d), Mr. Q is ineligible for a 2011 PFD and his appeal fails.

Additionally, the court has held that

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*.⁷

⁴ AK Const. Art. 1, § 15.

⁵ AS 43.23.005(d) (1996).

⁶ AS 43.23.005(d)(2).

⁷ *State v. Anthony*, 816 P.2d 1377, 1379 (Alaska 1991); *Hertz v. Storer*, 943 P.2d 725, 726 (Alaska 1997).

IV. Conclusion

The Alaska Supreme Court has previously ruled on the issue Mr. Q raises and rejected the argument that AS 43.23.005(d)(2)(B) is unconstitutional. Accordingly, the Division's denial of Mr. Q's 2011 PFD application is affirmed.

DATED this 11th day of June, 2012.

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 16th day of July, 2012.

By: Signed
Signature
Angela M. Rodell
Name
Deputy Commissioner
Title

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