

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

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|-------------------------------------|---|-------------------------------|
| IN THE MATTER OF |) | |
| M K |) | Case No. OAH 11-0464-PFD |
| |) | Agency Case No. 2011-021-1339 |
| <u>2011 Permanent Fund Dividend</u> |) | |

DECISION & ORDER

I. Introduction

M K timely applied for a 2011 permanent fund dividend (PFD). The Permanent Fund Dividend Division (division) determined that Mr. K was not eligible, and it denied the application initially and at the informal appeal level. Mr. K requested a formal hearing by written correspondence. Mr. K later requested a formal hearing, which was held on January 24, 2012. The division was represented at the hearing by PFD Specialist Bethany Chase, who also filed a position paper.

This case is Mr. K's appeal of the division's determination that he is disqualified from eligibility for a 2011 PFD because he was incarcerated in 2010 for a felony conviction. Administrative Law Judge Mark T. Handley heard the appeal. Having reviewed that record and after due deliberation, the Administrative Law Judge concludes that Mr. K is disqualified despite his incarceration being for a probation violation. Mr. K' was serving part of his sentence for the felony conviction, which had originally been suspended, but was imposed in 2010 because of his probation violation. The division's denial of Mr. K' 2011 permanent fund dividend application is upheld.

II. Facts

Department of Corrections records show that Mr. K incarcerated for a felony conviction in 2010.¹ In his request for a formal hearing, Mr. K does not dispute the division's determination that he was incarcerated in 2010. Mr. K explained that he was not incarcerated in 2010 for his original sentence on the felony conviction, but rather as the result of a probation violation. At the hearing, Mr. K admitted that the probation that he was sentenced for violating was probation for a felony conviction.²

III. Discussion

This case is governed by AS 43.23.005(d)(2), which states:

¹ Exhibit 4.

² Recording of Hearing.

Notwithstanding the provisions of (a) - (c) of this section, an individual is not eligible for a permanent fund dividend for a dividend year when

- (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
 - (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.

In an appeal of a PFD denial, the person who filed the appeal, in this case Mr. K, has the burden of proving by a preponderance of the evidence that the division's denial was incorrect.³ Mr. K did not dispute the division's factual finding that he was incarcerated in 2010. Mr. K argues that his PFD application should not be denied based on 2010 incarceration because he was in jail for a probation violation. Mr. K was on probation as part of his sentence for a felony conviction. Part of that sentence originally included suspended jail time which was imposed for violating the terms of his probation for the felony conviction. Even though there was a probation violation adjudication and sentencing that resulted in Mr. K' 2010 jail time, that incarceration was still the result of his conviction for the original felony.

IV. Conclusion

Mr. K' incarceration for felony probation violation in 2010 makes Mr. K ineligible for a 2011 PFD. The division denial of the application of M K for a 2011 permanent fund dividend is therefore affirmed.

DATED this 6th day of February, 2012.

By: *Signed* _____
Mark T. Handley
Administrative Law Judge

³ 15 AAC 05.030(h).

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, 2012.

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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