

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

In the Matter of:	)	
	)	
M J D, Jr.	)	
	)	OAH No. 12-0072-PFD
<u>2011 Permanent Fund Dividend</u>	)	Agency No. 2011-045-3655

**DECISION**

**I. Introduction**

Mr. D applied for a 2011 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (division) determined that he was not eligible to receive a PFD because he had been incarcerated during 2010 as a result of a prior conviction. After completing the informal appeal procedure, Mr. D requested a formal hearing.

A formal hearing was held by telephone on April 23, 2012. Mr. D represented himself. The division was represented by PFD specialist Peter Scott. Based on the evidence presented at the hearing, and the applicable law, Mr. D is not entitled to receive a 2011 PFD.

**II. Facts**

The relevant facts are not in dispute. Mr. D testified that he was incarcerated from June 13 through October 4, 2010. According to Mr. D, this incarceration occurred because his probation had been revoked in a 2004 criminal case. Mr. D confirmed that the 2004 case resulted in a felony conviction for driving under the influence.

**III. Discussion**

The state legislature has determined that an otherwise eligible resident is not eligible to receive a PFD if

during all or part of the qualifying year, the individual was incarcerated as a result of a 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.<sup>[1]</sup>

Mr. D applied for a 2011 PFD.<sup>2</sup> Accordingly, the qualifying year is 2010.<sup>3</sup>

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<sup>1</sup> AS 43.23.005(d)(2).

Although he concedes that he was incarcerated during 2010, Mr. D makes two arguments as to why that incarceration does not make him ineligible. First, he argued that the division's initial denial was incorrect. The division's denial notice asserted that Mr. D had been incarcerated in 2010 because of a misdemeanor. He did have a misdemeanor conviction in 2009,<sup>4</sup> but he was placed on unsupervised probation as a result of that conviction, and did not serve jail time during 2010 because of this 2009 conviction.<sup>5</sup> In its Formal Hearing Position Statement, the division concedes that it had incorrectly determined that Mr. D had served time as a result of this conviction.<sup>6</sup> Mr. D has met his burden of proving that this initial determination was incorrect.

However, in its Position Statement, the division argues that while Mr. D was not incarcerated because of a misdemeanor conviction, he was incarcerated.<sup>7</sup> The actual reason for this incarceration was that Mr. D' probation from his 2004 conviction had been revoked.<sup>8</sup> Mr. D asserts that he was incarcerated in 2010 because of a probation violation, and not because of his prior felony conviction.

The question that must be answered is whether the applicant is serving time as a result of a prior conviction.<sup>9</sup> This precise issue has been addressed in prior decisions. Those decisions hold that incarceration after probation is revoked is incarceration as a result of the prior conviction.

Simply violating probation is not a separate crime for which a judge may sentence the probationer. 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.<sup>[10]</sup>

Similarly,

[V]iolating probation is not a separate crime for which a judge may sentence the defendant additional time to serve. The time that is served when probation is

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<sup>2</sup> Exhibit 1.

<sup>3</sup> AS 43.23.095(6) (definition of qualifying year).

<sup>4</sup> Exhibit 5, page 2.

<sup>5</sup> Exhibit 5, page 3; Exhibit 8, page 3; testimony of Mr. D.

<sup>6</sup> Position Statement, page 1.

<sup>7</sup> *Id.*

<sup>8</sup> Mr. D' testimony.

<sup>9</sup> AS 43.23.005(d)(2).

<sup>10</sup> *In re. T.B.*, OAH No. 09-0001-PFD (Commissioner of Revenue 2009) page 3 (internal footnotes omitted).

revoked is time to serve that the judge ordered when sentencing the defendant on the original felony.<sup>[11]</sup>

Conduct that violates the terms of probation may be illegal conduct that could result in a separate conviction and period of incarceration. But non-criminal conduct can also be the basis of probation revocation, such as failing to show up for court ordered community service.<sup>12</sup> In this case, there is no evidence of an additional criminal conviction leading to incarceration during 2010. As Mr. D testified, his probation was revoked in the 2004 case. His period of incarceration was for time he was sentenced to serve as a result of that 2004 conviction.

#### **IV. Conclusion**

The division's original determination as to the basis for denying Mr. D' application was incorrect. During the formal hearing process, however, the division correctly determined that Mr. D was incarcerated during 2010 because of a prior felony conviction. Because he was incarcerated as a result of a felony conviction during the qualifying year, Mr. D is not entitled to receive a 2011 PFD. The division's determination is AFFIRMED.

Dated this 24<sup>th</sup> day of April, 2012.

Signed  
Jeffrey A. Friedman  
Administrative Law Judge

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<sup>11</sup> *In re P.V.*, OAH No. 05-0072-PFD (Commissioner of Revenue 2005) page 2.

<sup>12</sup> *See In re D.B.*, OAH No. 08-0697-PFD (Commissioner of Revenue 2009) page 2.

**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 24<sup>th</sup> day of May, 2012.

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

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