

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

In the Matter of	)	
	)	
S O. E III	)	
	)	
<u>2012 Permanent Fund Dividend</u>	)	OAH No. 13-0107-PFD Agency No. 2012-054-8803

**DECISION & ORDER**

**I. Introduction**

The application of S O. E III for a 2012 Permanent Fund Dividend (PFD) was denied because the Permanent Fund Dividend Division determined that he had been incarcerated during the qualifying year under circumstances that would render him ineligible. Following an unsuccessful informal appeal,<sup>1</sup> Mr. E requested a formal hearing. The hearing took place on March 11, 2013 in Anchorage, with Mr. E appearing in person and representing himself.

The Division's denial of Mr. E's application is affirmed because he indeed had a disqualifying incarceration during the qualifying year.

**II. Facts**

S O. E III of Anchorage, a longtime Alaskan, timely applied for a 2012 PFD. There are no issues regarding his eligibility apart from his confinement during the preceding year.

During the hearing, the parties came to agreement on the relevant facts. Mr. E has a felony conviction from 2002. In 2007, he was convicted of a misdemeanor. He served five days in jail at that time.<sup>2</sup> Part of his sentence was a requirement for community service. In late 2010, he asked to have the community service converted to jail time because, as a single parent, he was finding it hard to complete the community service outside his home.<sup>3</sup> The court accepted his request and remanded him to ankle monitoring for ten days, beginning March 21, 2011.<sup>4</sup> He served the period of monitored home confinement between March 21 and April 3, 2011.<sup>5</sup>

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<sup>1</sup> Mr. E was successful in a first informal appeal, because the exact nature of his incarceration had been misunderstood. However, his application was still denied on the basis of a disqualifying incarceration, and that denial was upheld in a second informal appeal.

<sup>2</sup> Ex. 16 at 00012.

<sup>3</sup> Ex. 12 at 3.

<sup>4</sup> Ex. 12 at 3-4.

<sup>5</sup> Ex. 13 at 2; E testimony.

### 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.”<sup>6</sup> The qualifying year for a 2012 dividend was 2011.<sup>7</sup> Mr. E had been convicted of a felony prior to that year. Therefore, if he was incarcerated in 2011 as a result of his 2007 misdemeanor conviction, he disqualified himself from a 2012 dividend. Mr. E served a period of electronically-monitored home confinement for his 2007 misdemeanor during 2011.

The legal question presented by this case is whether home confinement monitored by an ankle bracelet represents an incarceration. In a prior formal appeal by a person in the same situation as Mr. E, the Department of Revenue has interpreted the word “incarcerated” in the statute to include a furlough to a non-penal setting monitored by an electronic device.<sup>8</sup> That interpretation, which is a reasonable construction of the statute,<sup>9</sup> should be applied to Mr. E as well.

### IV. Conclusion

Mr. E’s incarceration in 2011 via ankle bracelet as a result of a misdemeanor conviction disqualifies him from a 2012 PFD. The decision of the Permanent Fund Dividend

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<sup>6</sup> 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.

<sup>7</sup> AS 43.23.095(6).

<sup>8</sup> *In re B.K.Y.*, OAH No. 08-0657-PFD (Dep’t of Revenue 2009). The interpretation also appears in a regulatory definition, 15 AAC 23.993(a)(15), but that definition formally applies only to appearances of the word “incarcerated” in Title 15, Chapter 23 of the Alaska Administrative Code, not to appearances of the word in Alaska Statutes. In *In re B.K.Y.* the department officially extended that interpretation to the statute.

<sup>9</sup> Courts have similarly interpreted the word “incarcerated.” *See, e.g., State v. Barfield*, 81 So. 3d 760, 768 (La. App. 2011) (ankle monitoring is “home incarceration”); *Lawton v. Commonwealth*, 354 S.W.3d 565, 567 (Ky. 2011) (same). *But see Matthew v. State*, 152 P.3d 469 (Alaska App. 2007) (pretrial bracelet monitoring restricting defendant to home and work did not impose conditions approximating incarceration).

An apparent purpose of the eligibility restriction in AS 43.23.005(d) is to provide a source of funds to defray the cost of Department of Corrections “incarceration and probation programs.” Sec. 4, ch. 46, SLA 1996. Sentenced individuals serving under ankle monitoring presumably impose a cost on one or both of these programs, and hence the Department’s interpretation of “incarcerated” in the statute furthers the statute’s purpose.

Division to deny the application of S O. E III for a 2012 Permanent Fund Dividend is  
AFFIRMED.

DATED this 11<sup>th</sup> day of March, 2013.

By: Signed  
Christopher Kennedy  
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 8<sup>th</sup> day of April, 2013.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Administrative Law Judge  
Title

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