

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

| | | |
|-------------------------------------|---|--------------------------|
| In the Matter of: |) | |
| |) | |
| E N |) | |
| |) | OAH No. 13-1690-PFD |
| <u>2013 Permanent Fund Dividend</u> |) | Agency No. 2013-044-7018 |

DECISION

I. Introduction

E N applied for a 2013 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (division) denied her application because she had been incarcerated for a misdemeanor offense during the 2012 qualifying year and she had one prior felony conviction. Ms. N contested that denial, and requested a formal hearing, arguing that the felony crime at issue was committed prior to January 1, 1997, and therefore should not be considered. Because the legislation amending the eligibility rules for applicants incarcerated for misdemeanors specifically says that crimes committed prior to January 1, 1997 are not to be counted, the division’s determination is reversed, and Ms. N is eligible for a 2013 PFD.

II. Facts

The relevant facts for purposes of this decision are not in dispute.¹ Ms. N committed a felony offense in October of 1996. She was not convicted until February of the following year. Ms. N committed another offense in 2007. For that offense, she was convicted on two misdemeanor charges arising out of a single incident on April of 2007.

In 2012, Ms. N was convicted again. This was also a misdemeanor, and she served time in jail for that misdemeanor during 2012.

III. Discussion

A. *Changes to Alaska Statute 43.23.005*

Alaska Statute 43.23.005 sets out a list of requirements for PFD eligibility. In this case, the only reason for determining that Ms. N was not eligible was the limitation set out in AS

¹ The relevant facts are contained in the division’s exhibits and were confirmed by Ms. N during her testimony.

43.23.005(d). That sub-section limits eligibility for certain individuals who are sentenced or incarcerated during the qualifying year.² Sub-section d has been amended several times.

In 1995, only people incarcerated as a result of a felony were ineligible under this sub-section. At that time, the law said:

Notwithstanding the provisions of (a) – (c) of this section, 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.^[3]

This statute was amended during the 1996 legislative session. After the amendment, certain people incarcerated because of a misdemeanor were also ineligible to receive a PFD. The new version said:

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 calendar year immediately preceding that dividend year the individual was sentenced as a result of conviction in this state of a felony;
- (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 11.81.900.^[4]

This subsection was amended again in 2001. That amendment changed the law to the version currently in effect:

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 calendar year immediately preceding that dividend year the individual was sentenced as a result of conviction in this state of a felony;
- (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

(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.^[5]

² The qualifying year is the year immediately preceding January 1 of the dividend year. AS 43.23.095(6).

³ AS 43.23.005(d) (1995 version of statute).

⁴ 1996 version as amended by 46 SLA 1996, Section 2.

⁵ 92 SLA 2001, Section 25.

To summarize, prior to 1996 a person was not eligible for a PFD if he or she was incarcerated as a result of a felony conviction during any part of the qualifying year. After 1996, a person incarcerated as a result of a felony was still ineligible. In addition, a person incarcerated during the qualifying year as a result of a misdemeanor was also ineligible if he or she had two prior convictions. Those convictions could be two felonies, one felony and one misdemeanor, or two misdemeanors. After the final change in 2001, a person incarcerated as a result of a felony was eligible and a person was also ineligible if incarcerated during the qualifying year for a misdemeanor if he or she had one prior felony or two prior misdemeanor convictions.

B. Ms. N is Eligible for a 2012 PFD

Ms. N had been convicted of a prior felony when she was incarcerated in 2012 for a misdemeanor. However, when the legislature amended the law in 1996, it addressed the question of whether the “two or more prior crimes” language in the 1996 statute would include crimes committed before the legislative change. The legislation adopted in 1996 says:

The amendments made by secs. 2 and 3 of this Act apply only to individuals convicted of crimes committed after December 31, 1996. Convictions for crimes committed before January 1, 1997, may not be considered in determining the number of prior convictions for purposes of applying AS 43.23.005(d)(2)(B).^[6]

Based on the 1996 version of AS 43.23.005(d), Ms. N was not ineligible because her felony was committed before January 1, 1997. Thus it could not be counted as one of the “two or more prior crimes” required to preclude eligibility. As defined by the version of AS 43.23.005(d)(2)(B) in existence in 1996, she had only one prior conviction.⁷

However, this section was again amended in 2001.⁸ After that amendment, one prior felony was sufficient to make a person ineligible for a PFD. Although this amendment modified the number of felony convictions required, it did not repeal 46 SLA 1996, Section 6. This legislation did not say that felonies committed prior to January 1, 1997 could now be counted towards the prior convictions referred to AS 43.23.005(d)(2)(B).

⁶ 46 SLA 1996, Section 6.

⁷ The two misdemeanor convictions in 2007 are treated as a single conviction because they arose out of a single criminal episode. AS 43.23.005(g).

⁸ 92 SLA 2001, Section 25.

The division noted that prior decisions have held that a person incarcerated as a result of a felony is ineligible for a PFD even if the felony was committed prior to January 1, 1997. It argued that the same principal should apply to people incarcerated as a result of a misdemeanor.

*In re S.R.H.*⁹ considered an applicant who had been convicted of a felony in 1984. He remained incarcerated in 2008, and was denied his PFD pursuant to AS 43.23.005(d)(2)(A). Subsection (d)(2)(A) provides that someone incarcerated as a result of a felony is not eligible for a PFD. That was true prior to the 1996 amendment to AS 43.23.005(d). Under the earlier version of this statute, a person incarcerated as a result of a felony conviction was ineligible regardless of when the crime was committed. The 1996 amendment did not change that provision; it only added a new provision applicable to misdemeanor incarcerations.

As discussed above, it is the 1996 amendments to subsection (d) that only apply to crimes committed before January 1, 1997.¹⁰ Provisions that were in effect prior to those amendments are not limited by date. This is reflected in the Editor's Note to AS 43.23.005 which says

Section 6, ch. 46, SLA 1996 provides that the 1996 amendments that amended subsection (d) and added (g) “apply only to individuals convicted of crimes committed after December 31, 1996” and that “[c]onvictions for crimes committed before January 1, 1997, may not be considered in determining the number of prior convictions for purposes of applying AS 43.23.005(d)(2)(B).”¹¹

This note clarifies that convictions for crimes before January 1, 1997, are not counted for purposes of subsection (d)(2)(B). Convictions for crimes committed before that date still count for subsection (d)(2)(A) because the 1996 amendments did not change anything in regard to people incarcerated for a felony.

Prior Department of Revenue decisions are consistent with this holding, although they have not always explicitly distinguished between AS 43.23.005(d)(2)(A) and (d)(2)(B). That is because the issues raised in those prior cases did not require making that distinction. For example, in *In re T.B.*,¹² the commissioner considered an appeal from an applicant who had been denied a PFD because she was incarcerated for a misdemeanor. The disputed issue in that case was whether T.B. had been incarcerated as a result of her third misdemeanor, or her second misdemeanor. That case quoted from AS 43.23.005(d), and noted “The statute counts prior

⁹ OAH No. 09-0675-PFD (Commissioner of Revenue 2010).

¹⁰ 46 SLA 1996, Section 6.

¹¹ Editor's Note to AS 43.23.005. Editor's notes are not part of the law in Alaska, AS 01.05.006, but they do help identify relevant portions of the law that might otherwise be overlooked.

¹² OAH No. 09-0001-PFD (Commissioner of Revenue 2009). Prior PFD decisions are available on line at <http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=PFD>

convictions for criminal offenses committed on or after January 1, 1997.”¹³ Since *In re T B* only involved incarceration as a result of a misdemeanor, it was not necessary to distinguish between AS 43.23.005(d)(2)(A) and (d)(2)(B).

In re E R H,¹⁴ also involved misdemeanor convictions. That decision noted that AS 43.23.005(d) only applied to misdemeanors after December 31, 1996. That statement was correct in the context of *In re E R H*, but could have clarified that the limitation did not apply to people incarcerated as a result of a felony.¹⁵

However, in *In re D E J*,¹⁶ the Commissioner considered an applicant who had been incarcerated as a result of a felony. Although the decision did not turn on when the applicant’s offense was committed, this decision does say only offenses committed on or after January 1, 1997 are counted.¹⁷ To the extent *In re D E J*, can be interpreted as saying that a person incarcerated for a felony is only ineligible if the felony was committed on or after January 1, 1997, that decision is clarified because the limitation to pre-1997 offenses only applies to individuals who are incarcerated as a result of a misdemeanor.

IV. Conclusion

The law regarding PFD eligibility distinguishes between applicants incarcerated as a result of a felony and those who are incarcerated as a result of a misdemeanor. Those in the second category are ineligible only if they have one prior felony or two prior misdemeanors. In addition, when the legislature added the second ineligibility category, it specifically stated that only crimes committed on or after January 1, 1997 could be counted as prior crimes. Because Ms. N’s prior felony conviction was for a crime committed prior to that date, it cannot be counted as a prior crime and she is eligible for a 2013 PFD.

Dated this 31st day of December, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

¹³ *In re T B*, OAH No. 09-0001-PFD, page 3.

¹⁴ OAH No. 13-0106-PFD (Commissioner of Revenue 2013).

¹⁵ *See also In re S G*, OAH No. 08-0700-PFD (Commissioner of Revenue 2009), fn 3 (quoting from Sec. 6 ch. 46 SLA 1996).

¹⁶ OAH No. 13-0030-PFD (Commissioner of Revenue 2013).

¹⁷ *In re D E J*, OAH No. 13-0030-PFD, page 1.

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 12th day of February, 2014.

By: Signed
Signature
Angela M. Rodell
Name
Commissioner
Title

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