

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

In the Matter of:)	
)	
N Q)	OAH No. 17-1110-PFD
_____)	Agency No. 2017-057-6877

DECISION

I. Introduction

This matter is before the Office of Administrative Hearings on Ms. Q’s appeal of the Permanent Fund Dividend Division’s denial of her application for a 2017 permanent fund dividend (PFD). The Division denied Ms. Q’s application on the ground that she had been incarcerated during all or part of calendar year 2016 as the result of a misdemeanor conviction and that she had been previously convicted of two or more prior misdemeanors during the period from January 1, 1997 through December 31, 2016. Ms. Q appealed arguing: 1) that her 2016 misdemeanor theft conviction only resulted in electronic monitoring and thus was not “incarceration” as defined in 15 AAC 23.993(a)(15); 2) that a different 2016 case did not count as a felony conviction under AS 43.23.005(d) since she was participating in a therapeutic court program, the Coordinated Research Program (CRP), and her conviction would be reduced upon successful completion of the program; and 3) that extenuating circumstances in her life and underlying her prior misdemeanor convictions should be taken into consideration.

The Division was represented by PFD specialist Peter Scott. Ms. Q appeared telephonically and represented herself. L E, a representative of the CRP provided information at the request of Ms. Q.

Having heard the evidence and arguments of both parties and reviewed the record, after due deliberation, the undersigned Administrative Law Judge concludes that Ms. Q is not qualified for the 2017 PFD, and the decision of the division is affirmed.

II. Facts

The facts relevant to the division’s decision and application of AS 43.23.005(d)(B)(ii) are not generally in dispute, although the parties differ as to how those provisions should be applied.¹ The following recitation is based on the record and exhibits appended to the Division’s formal hearing position statement and the statements provided by Ms. Q and Ms. E at the hearing.

¹ Neither party gave sworn testimony, however, based on the relevant statute, there were no disputed factual issues.

Ms. Q timely filed her application for the 2016 PFD in March 2017.² The Division denied her request on July 28, 2017 on the basis of AS 43.23.005(d)(2)(B)(ii).³ Ms. Q filed a request for informal appeal and the Division upheld the denial of her application on September 21, 2017.⁴ Ms. Q then requested this formal appeal.

Alaska Department of Corrections records show that Ms. Q was convicted of a misdemeanor offense of theft in the 3rd degree on 00/00/2016 in Case No. 3XX-15-00000CR.⁵ The judgment in that case indicates that Ms. Q was sentenced to 10 days of electronic monitoring which she served during calendar year 2016.⁶ The Department of Corrections Verification Form lists two additional convictions for misdemeanors occurring after December 31, 1996: Case Numbers 3XX-12-00000CR (Theft in the Third Degree 00/00/2012) and 3XX-11-00000CR (DUI 00/00/2011).⁷

Ms. Q did not contest the facts of the above convictions. She provided a statement concerning a fourth case, Case No. 3XX-16-00000, in which she was charged with a felony count of Theft in the Second Degree.⁸ In that case, Ms. Q entered into a plea agreement whereby she pled guilty to the charge of Theft in the Second Degree, but agreed to enter the CRP, a therapeutic court that works with individuals diagnosed with mental disabilities who are charged with criminal offenses. According to the plea agreement, if she successfully completes the CRP program, she would be permitted to withdraw her plea to felony Theft in the Second Degree and the plea would be reduced to Theft in the Third Degree – a misdemeanor.⁹ Ms. Q and Ms. E both stated that Ms. Q was doing well and meeting the requirements of the program.

With regard to the earlier misdemeanor convictions, Ms. Q provided mitigating information concerning the facts of the convictions and her circumstances. As to the DUI conviction, she noted that she was not represented by a lawyer and had no money at the time. She further explained the circumstances of her misdemeanor theft conviction.¹⁰ Ms. Q also provided information concerning her struggles with certain mental health issues and her need for the PFD. Ms. Q stated that she is working hard to improve herself and deal with issues that have caused problems for her in the past.

² Exh. 1.

³ Exh. 2.

⁴ Exhs. 3, 5-6.

⁵ Exh. 10 pp. 2-3.

⁶ Exh. 4, p. 1, Exh. 10 pp. 2, 5.

⁷ Exh. 4.

⁸ Exh. 8.

⁹ Exh. 8, pp. 10-11.

¹⁰ Exh. 6, testimony of Ms. Q.

III. Discussion

This case is governed by AS 43.23.005(d)(2)(B)(ii), which provides:

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

(2) during all or part of the qualifying year, the individual was incarcerated as a result of the conviction in this state of a

(B) misdemeanor if the individual has been convicted of

(ii) two or more prior misdemeanors as defined in AS 11.81.900.

This section applies to convictions after December 31, 1996.

The first question is whether Ms. Q was incarcerated during all or part of 2016, the qualifying year for the 2017 PFD. The Division’s regulation at 15 AAC 23.993(a)(15) defines incarceration as follows:

(a) In this chapter, unless otherwise indicated,

(15) “incarcerated” means confined in a facility or setting under a court order for a conviction to restrain an individual’s movement and freedom, including a prison, jail, other penal institution, half-way house, hospital, medical facility, treatment facility, or a furlough to a non-penal setting monitored by an electronic device for the purpose of monitoring the individual’s movements.

The person appealing the denial of a PFD application has the burden of proving by a preponderance of the evidence that the Division’s denial was incorrect.¹¹ Under the Division’s definition at 15 AAC 23.993, the fact that Ms. Q served 10 days of electronic monitoring in 2016 for her misdemeanor theft conviction in Case No. 3XX-15-00000CR counts as having been “incarcerated” as a result of a conviction in this state for a misdemeanor.

Under AS 43.23.005(d)(2)(B), the only other question is whether Ms. Q also has been convicted of two or more prior misdemeanors that occurred after December 31, 1996. The record

¹¹ 15 AAC 05.030(h).

includes her two prior misdemeanor convictions in 2011 and 2012, which meet the disqualifying criteria set out in AS 43.23.005(d)(2)(B)(ii).

In her appeal Ms. Q focused on her continuing successful efforts to meet the requirements of the CRP program in her 2016 felony case, Case No. 3XX-16-00000CR. She is correct that her plea in that case may not have provided a basis to disqualify her from eligibility for the 2017 PFD. However, the Division did not base its decision on that case so this argument fails.

Ms. Q provided information explaining her previous misdemeanor convictions, arguing that mitigating circumstances should apply, and her PFD application should be approved. These arguments simply do not affect the statutory application of AS 43.23.005(d)(2) which turns solely on the fact of the convictions, a matter that Ms. Q does not dispute. Finally, Ms. Q's other personal circumstances and her dedicated effort to meet the requirements of the CRP program and improve herself, while fully commendable, similarly do not affect her eligibility for the 2017 dividend under the statute.

IV. Conclusion

For the above reasons, the decision of the Permanent Fund Dividend Division to deny the application of N Q for a 2017 Permanent Fund Dividend is AFFIRMED.

DATED: December 20, 2017.

By: Signed
Karen L. Loeffler
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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 16th day of January, 2018.

By: Signed
Signature
Karen L. Loeffler
Name
Administrative Law Judge
Title

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