

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

In the Matter of	)	
	)	
N B	)	OAH No. 18-1219 PFD
_____	)	Agency No. 2018-035-5469

**DECISION**

**I. Introduction**

Mr. N B appeals the denial of his 2018 Alaska Permanent Fund Dividend (PFD) application. Mr. B timely applied for his 2018 PFD; however, his application was denied by the Permanent Fund Dividend Division (Division) because Mr. B was incarcerated in 2017 for a felony conviction.<sup>1</sup> Following an unsuccessful informal appeal, Mr. B requested a formal hearing by correspondence. The record for appeal closed January 10, 2019. PFD Appeals Manager, Bethany Thorsteinson filed a position statement and Exhibits 1-10 on behalf of the Division. Mr. B submitted a hand-written document. All the documents were admitted and carefully considered. Because Mr. B was incarcerated in 2017 for a felony, the Division’s denial is AFFIRMED.

**II. Facts**

Mr. B is a 72-year-old male who was convicted of murder on 00/00/1983.<sup>2</sup> His incarceration began in 1982 and he remains incarcerated as a result of his conviction, with a proposed release date of November 17, 2048.<sup>3</sup>

**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 . . . felony.”<sup>4</sup> As the individual challenging the Division’s decision, it is Mr. B’s burden to establish that it is more likely than not that he is eligible for a 2018 PFD.

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<sup>1</sup> Mr. B filed two PFD applications (one on January 28, 2018 and the other on June 25, 2018). The June 25, 2018 application was invalidated, but the January 29, 2018, which was filed in a timely matter, is the subject of this case.

<sup>2</sup> Exhibit 6.

<sup>3</sup> Exhibit 4 at 2.

<sup>4</sup> AS 43.23.005(d).

The qualifying year for a 2018 dividend was 2017.<sup>5</sup> To receive the 2018 PFD, Mr. B must demonstrate he was not incarcerated for a felony during any part of 2017. It is undisputed that Mr. B was incarcerated in 2017; in fact, he remains incarcerated.<sup>6</sup> Therefore, Mr. B has not demonstrated the Division was incorrect in denying his 2018 PFD.

Mr. B cites two cases he submitted for consideration. While he does not specifically argue a position, he appears to be challenging the constitutionality of the PFD statutes. As set forth below, the Alaska Supreme Court has already found the restriction on felons receiving permanent funds to be constitutional.

Mr. B identifies *Blakely* as a case for consideration. Presumably he is referring to *Blakely v. Washington*, which held that the state trial court's sentencing of the defendant to more than three years above the 53-month statutory maximum of the standard range for his offense, based on the finding that the defendant acted with deliberate cruelty, violated the defendant's Sixth Amendment right to trial by jury.<sup>7</sup> But restricting an incarcerated felon from receiving a PFD is not the same as a deprivation of a constitutional right. The Alaska Supreme Court has held that PFDs are not a fundamental right.<sup>8</sup> And, as set forth in *State v. Anthony*, the mere fact that AS 43.23.005(d) alters a convicted felon's circumstances to his disadvantage, does not invalidate the statute.<sup>9</sup>

The second case Mr. B cites is *McGann v. Cunningham*, which is a case involving an inmate being incarcerated longer than sentenced because of miscalculations of “good time” credit, and therefore depriving him of his liberties.<sup>10</sup> Again, deprivation of a PFD is not a deprivation of a liberty.<sup>11</sup> Instead, a PFD is merely an economic interest.<sup>12</sup>

#### IV. Conclusion

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<sup>5</sup> AS 43.23.095(6).

<sup>6</sup> Exhibit 4 at 2.

<sup>7</sup> *Blakely v. Washington*, 542 U.S. 961 (2004).

<sup>8</sup> *Ross v. State, Dep't of Revenue*, 2014 WL 355985, at 910.

<sup>9</sup> *State v. Anthony*, 816 P.2d 1377 (Alaska 1991) See also, e.g., *Flemming v. Nestor*, 363 U.S. 603, 613–14, 80 S.Ct. 1367, 1374, 4 L.Ed.2d 1435 (1960) (dismissed ex post facto challenge to statute terminating social security retirement benefits of deported aliens); *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (1960) (upheld New York statute prohibiting solicitation of waterfront employees by labor organization if any officer or agent of such organization had been convicted of a felony); *Jones v. Heckler*, 774 F.2d 997 (10th Cir.1985) (upheld statute denying social security benefits to felons during period of incarceration); *Auditor Gen. v. Olezniczak*, 4 N.W.2d 679, 680–81 (Mich. 1942) (upheld prison reimbursement act imposing civil liability on all prisoners able to pay for their maintenance); *Golden v. Okfuskee County Election Bd.*, 723 P.2d 982 (Okla.1986) (upheld law forbidding persons who have entered guilty pleas to certain offenses from holding public office).

<sup>10</sup> 315 F.Supp.2d 150 (D. N. H 2004).

<sup>11</sup> *Ross v. State, Dep't of Revenue*, 2014 WL 355985, at 910.

<sup>12</sup> *Id.*

The cases cited by Mr. B address important fundamental rights; however, because the PFD is not a fundamental right or entitlement, their application in this case is not persuasive. The Alaska Supreme Court has already determined that restrictions on felons to receive a PFD is constitutional.

Because Mr. B was incarcerated in 2017 for a felony, Mr. B is not eligible to receive the 2018 PFD. The Division's decision is upheld.

DATED January 28, 2019

By: Signed  
Signature  
Hanna Sebold  
Name  
Administrative Law Judge  
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

### 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 \_\_\_\_\_ day of \_\_\_\_\_, 2019.

By: Signed  
Name: Lawrence A. Pederson  
Title: Administrative Law Judge

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