

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

In the Matter of)	
)	
K T)	OAH No. 20-0715-PFD
)	Agency No. 2020-066-9070
_____)	

DECISION

I. Introduction

K T applied for a 2020 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (Division) denied his application because the Department of Corrections (DOC) identified him as an individual incarcerated as the result of a conviction for an offense described in AS 43.23.005(d) and, therefore, ineligible for the PFD. Mr. T appealed.

The telephonic hearing took place September 28, 2020 and October 15, 2020. The issue for resolution was whether time spent in custody on a misdemeanor due to the inability to post bail qualified as “incarceration as the result of conviction” in the absence of a subsequent sentence of imprisonment. Having considered the arguments regarding proper interpretation of the applicable statute, this decision concludes the DOC incorrectly identified Mr. T as ineligible.

As a result, the Division’s decision to deny his 2020 PFD is Reversed.

II. Facts

On October 15, 2018 the Anchorage Police Department obtained a warrant for K T’s arrest for the misdemeanor crime of Violating a Domestic Violence Restraining Order, AMC 08.30.105(A)(1).¹ Mr. T was arrested October 16, 2018. He appeared at arraignment where he plead not guilty and was released later the same day after posting a bond.² Mr. T subsequently failed to appear for trial call on August 29, 2019.³ Another warrant issued for his arrest.⁴ He was arrested on that warrant September 4, 2019.⁵ He remained in custody at the Department of Corrections until his bond was posted on September 11, 2019.⁶

¹ Ex. 7, pp. 1-6.
² *Id.*, pp. 7-8, 14.
³ *Id.*, pp. 16, 24.
⁴ *Id.*
⁵ *Id.*, p. 24.
⁶ *Id.*, pp. 27-28.

Rather than go to trial, Mr. T negotiated a plea and sentence bargain. He changed his plea from not guilty to no contest on September 19, 2019.⁷ He received a negotiated sentence of 30 days to serve with all 30 days suspended.⁸ Legally, he received no jail time to serve. Nor was he ordered to pay a jail surcharge.⁹

Mr. T applied for his 2020 PFD on April 30, 2020.¹⁰ It was received by the Division on May 4, 2020.¹¹

The Division denied his application on June 5, 2020, after the DOC reported Mr. T was ineligible under AS 43.23.005(d) because he was incarcerated for a felony during the qualifying year.¹²

Mr. T filed an informal appeal asserting that he had not been incarcerated on a felony during the qualifying year.¹³

The Division agreed Mr. T had not been incarcerated on a felony, but upheld the prior denial after concluding he remained ineligible under AS 43.3.005(d) because he had been incarcerated as the result of a conviction on a misdemeanor during the qualifying year and at the time of that incarceration had a prior trigger felony.¹⁴

Mr. T filed a timely request for formal appeal.¹⁵

The telephonic hearing took place over two days, September 28 and October 15, 2020. Mr. T represented himself. PFD Specialist Peter Scott represented the Division.

The Division presented the court records from *Municipality of Anchorage v. K T*, 3AN-18-00000CR.¹⁶ It also presented time accounting records from DOC reporting Mr. T was in custody from May 29, 2019 to June 3, 2019¹⁷ and September 4-12, 2019.¹⁸ The DOC records also verified Mr. T's conviction of felony burglary in 2018.¹⁹

7 *Id.*, 31-32.

8 *Id.*

9 *Id.*

10 Ex. 1.

11 *Id.*

12 Ex. 2.

13 Ex. 3.

14 Ex. 4.

15 Ex. 6.

16 Ex. 7.

17 These dates are inconsistent with court records. Ex. 7, p. 16.

18 Ex. 4, p. 2.

19 *Id.*

It was clear from those records that the time Mr. T spent in custody at DOC in 2019 was unrelated to a felony offence. It occurred prior to his conviction on the misdemeanor charge in 3AN-18-00000CR.²⁰ Mr. T's judgment conclusively demonstrated that he did not receive any active jail time to serve as a condition of his sentence in 3AN-18-00000CR.²¹ He received a sentence of suspended jail time.²²

The Division nevertheless argued that the time Mr. T spent in custody pending trial qualified as "incarceration as a result of conviction" for purposes of AS 43.23.005(d).

III. Discussion

In an appeal of a PFD denial, the person who filed the appeal, in this case Mr. T, has the burden of proving by a preponderance of the evidence that the Division's denial was incorrect.²³

Alaska Statute 43.23.005 sets out a list of requirements for PFD eligibility. In this case, the Division determined Mr. T was not eligible due to the limitation set out in AS 43.23.005(d). That sub-section limits eligibility for certain individuals who are sentenced or incarcerated during the qualifying year.²⁴

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 misdemeanors²⁵ as defined in AS 11.81.900.²⁶

²⁰ Id.

²¹ Testimony of Peter Scott.

²² Ex. 7, pp. 31-32.

²³ 15 AAC 05.030(h).

²⁴ The qualifying year is the year immediately preceding January 1 of the dividend year. AS 43.23.095(6).

²⁵ The provision that denies eligibility based on two or more prior misdemeanors only applies to misdemeanors committed after December 31, 1996. *In the Matter of E.N.*, OAH No. 13-1690-PFD (Commissioner of Revenue 2014). Available online at <http://aws.state.ak.us/officeofadminhearings/Documents/PFD/PFD131690.pdf>.

²⁶ AS 43.23.005(d) (emphasis added).

For purposes of AS 43.23.005(d)(2)(B), there was no dispute that Mr. T spent time detained in custody at the DOC during the qualifying year or that he had a prior felony conviction. Mr. T's case raises the question of whether the time he spent in custody at the Department of Corrections as a condition of bail qualifies as "incarceration as the result" of his misdemeanor conviction when he did not receive active time to serve when sentenced.

This issue has previously been decided by the Office of Administrative Hearings (OAH). The decision *In re E.A.S.*, OAH No. 09-0254-PFD (Commissioner of Revenue 2009) addressed the identical fact pattern of whether time spent in custody while detained due to the inability to post bail qualified as "incarcerated as the result of the conviction" when the final misdemeanor judgement did not include active jail time to serve. Relying on straightforward statutory construction, the decision concluded it did not.

In this case, the Division requested OAH reconsider and depart from this precedent. The Division asserted three reasons to do so: the need to reimburse the DOC for the costs of housing the offender, the burden on the DOC to provide more accurate record keeping to the Division, and the Division's position that Mr. T was sentenced in contravention best practices making it appropriate to find him ineligible for the PFD as a correction of that error. These arguments were not persuasive.

This decision declines to vary from precedent. The *In re E.A.S.* decision is correctly decided under established rules of statutory construction. Statutes and regulations are interpreted *de novo* by looking at three factors: the language of the regulation, the regulatory history, and the purpose behind the regulation.²⁷ Although Alaska no longer strictly applies the "plain meaning" rule of statutory construction, the clearer the regulatory language, the more convincing any contrary regulatory history must be to overcome the plain language adopted.²⁸

The regulation is quite straightforward. The phrase "incarcerated as a result of conviction" is grammatically direct. Mr. T was never incarcerated as the result of his conviction. He was detained in custody pending posting of bail, but that detention would have occurred regardless of whether he was subsequently convicted of the charge or not. His judgment imposed no period of incarceration.²⁹

²⁷ *Western Star Trucks, Inc. v. Big Iron Equip. Serv., Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

²⁸ *City of Valdez v. State*, 372 P.3d 240, 248 (Alaska 2016); *Benavides v. State*, 151 P.3d 332 (2006).

²⁹ Ex. 7, pp. 31-32.

In addition, unlike AS 43.23.005(d)(1) applying to felons which removes PFD eligibility upon “sentencing” without the requirement of time to serve, AS 43.23.005(d)(2) applying to misdemeanants specifically requires incarceration as a result of conviction. The difference in language conveys a different meaning which must be given effect and due regard.³⁰ The legislature has chosen different standards of PFD eligibility for felony and misdemeanor offenders. The Division’s suggested interpretation would eliminate the distinction between the statutory subsections in clear contravention of the language selected by the legislature.

Both the plain language of AS 43.23.005(d) and the legislative intent demonstrated from that language lead to the conclusion the Division erred in its denial decision. The Division did not identify anything in the legislative history regarding AS 43.23.005(d) to counter or rebut the plain language adopted by the legislature. Nor did the Division present other convincing reason to do so.³¹

The statute should be enforced as written.

IV. Conclusion

Mr. T was not incarcerated in 2019 as the result of a misdemeanor conviction. He was in custody due to his inability to post bail. The DOC incorrectly identified him as ineligible for the 2020 PFD.

Accordingly, the Division’s denial decision is Reversed.

Dated: October 28, 2020

Signed _____
Carmen E. Clark
Administrative Law Judge

³⁰ *E.g., Tesoro Petroleum Corp. v. State*, 42 P. 3d. 531, 537 (Alaska 2002) (citation omitted).

³¹ No specific legislative history was presented to support the Division’s suggestion the purpose of the legislation was to further a state interest in decreasing jail costs by passing them on to convicted offenders. If that were the legislative purpose, the legislature could have plainly said so and enacted a statutory scheme by which such PFDs could be collected by the state. Pursuant to AS 37.05.142 which prohibits the state from charging a fee for the provision of services unless otherwise authorized by statute, the legislature has expressly enacted AS 28.35.030(k) which requires misdemeanor DUI offenders to pay for the estimated costs of their incarceration and AS 12.55.041 which provides for the payment of “correctional facility surcharges” by most criminal defendants. If these costs are not paid, the state is authorized to seek reimbursement from the person’s PFD. Here, in contrast, there is no nexus between estimated cost and PFD forfeiture. The same amount is forfeited whether the individual spends 1 day in custody or 360 days. Nor do the funds from the unclaimable PFDs go to the DOC. The idea they are “reimbursement” is rejected.

The Division’s other arguments may be summarily disposed. The DOC is responsible for tracking an offender’s time to serve. To do so it receives a copy of every criminal judgment. It can, therefore, easily ascertain which misdemeanants received completely suspended jail time and provide that information to the Division. Nor is the Division charged with re-examining criminal sentences to determine their suitability. Even if Mr. T’s sentencing court erred and departed from best practices, the fact remains that Mr. T was not incarcerated as a result of his conviction and Title 43 does not provide authority for the action suggested by the Division.

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 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 24th day of November, 2020.

By: Signed
Signature
Carmen Clark
Name
Administrative Law Judge
Title

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