

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

In the Matter of)
)
 L D)
)
2020 Permanent Fund Dividend) OAH No. 20-0807-PFD
 Agency No. 2020-001-4187

DECISION

I. Introduction

The Permanent Fund Dividend Division denied L D’s application for a 2020 permanent fund dividend (PFD) because he was incarcerated for a misdemeanor during the qualifying year, 2019, when he had two or more prior misdemeanor convictions. Following an unsuccessful informal appeal, Mr. D requested a hearing. That hearing request was received nine days past the deadline.

At the telephonic hearing, Mr. D acknowledged being incarcerated and convicted during the qualifying year. However, he argued that per AS 43.23.005(d)(2), the Division may not consider his convictions outside of the qualifying year. If the statute were interpreted in the manner he suggests, Mr. D argued he would be entitled to a PFD. But, because Mr. D’s interpretation of the statute is in error, he is ineligible to receive a 2020 PFD. Accordingly, the Division’s decision denial of his PFD is affirmed.

II. Facts

Mr. D timely applied for a 2020 PFD.¹ His application was subsequently denied by the Division because it determined he was incarcerated during all or part of the 2019 qualifying year after having been convicted of two prior misdemeanor convictions.²

Mr. D has a misdemeanor criminal conviction from February 00, 2014, for refusing to submit to a chemical test, Case No. 3AN-13-00000 CR.³ Additionally, he has a misdemeanor criminal conviction from June 00, 2015, for disorderly conduct, Case No. 3AN-15-00000 CR.⁴ In addition to these two misdemeanor convictions, during the 2019 qualifying year, he was convicted on November 00, 2019, for the misdemeanor of operation of a vehicle under the

¹ Div. Ex. 1.
² Div. Ex. 3.
³ Div. Ex. 5.
⁴ Div. Ex. 5.

influence, Case No. 3AN-19-00000 CR.⁵ This conviction arose from a motor vehicle accident on August 00, 2019.⁶ After initially being taken into custody on that date, he made a court appearance on August 00, 2019.⁷ At that time, he was unable to make bail and remained in custody until October 00, 2019. At that point, bail was reduced and paid, and he was released after being detained for 65 days.⁸ Ultimately, he was convicted on November 00, 2019, and sentenced to jail for 360 days, 240 days of which were suspended.⁹ As the Department of Corrections has confirmed, Mr. D was thus sentenced to serve 120 days in jail and given credit for 65 days already served from August 00, 2019 until October 00, 2019.¹⁰

At the hearing, Mr. D did not deny the two above-referenced misdemeanor convictions in 2014 and 2015. Nor did he deny being held in jail from August until October 2019 and being convicted of operating a vehicle under the influence in November 2019.¹¹ Instead, he argued that per AS 43.23.005(d)(2), for purposes of determining his PFD eligibility, the Division is only allowed to consider his 2019 conviction, not his earlier convictions. He also argued that doing so violates his constitutional guarantees of due process and against double jeopardy.¹²

The Division also moved to dismiss Mr. D's appeal based on an untimely hearing request.¹³ It had originally denied his PFD application on June 5, 2020.¹⁴ Mr. D then filed a timely request for informal appeal received by the Division on July 2, 2020.¹⁵ The Division then issued its informal decision on August 11, 2020, again denying his application on the same basis as it was originally denied.¹⁶ As that decision instructed, a request for formal hearing was required to be submitted within 30 days, or in this instance, on or before September 10, 2020.¹⁷ However, Mr. D's request for formal hearing was not received by the Division until September 22, 2020, in an envelope postmarked September 19, 2020. As the Division asserted, the request was effectively nine days after the appeal deadline.¹⁸

⁵ Div. Ex. 5.

⁶ Div. Ex. 9, pp. 2-7.

⁷ Div. Ex. 9, p. 7.

⁸ Div. Ex. 9, pp. 7, 9-11; Div. Ex. 10, p. 1.

⁹ Div. Ex. 9, pp. 13-14.

¹⁰ Div. Ex. 10, p. 1.

¹¹ Testimony of L D.

¹² Testimony of L D.

¹³ *See generally*, Motion to Dismiss Appeal Request, dated October 29, 2020.

¹⁴ Div. Ex. 3.

¹⁵ Div. Ex. 4, p. 1.

¹⁶ Div. Ex. 6.

¹⁷ Div. Ex. 6, p. 2.

¹⁸ Div. Ex. 8, p. 1.

III. Discussion

There are two issues on this appeal. First, does good cause exist to allow consideration of the substantive appeal since Mr. D submitted his formal appeal request nine days past the deadline? Second, if the substantive issues are considered, is Mr. D eligible for a PFD based on the restrictions contained in AS 43.23.005(d)?

A. Reasonable Cause for Late Appeal

Per 15 AAC 05.010(b)(5), a request for appeal must be filed within 30 days of a notice of disallowance unless reasonable cause for the failure to do so is shown.¹⁹ This deadline is waivable by the administrative law judge on the similar but perhaps not identical basis that adhering to it would “work an injustice.”²⁰ Finally, though not addressing adherence to or waiver of deadlines, an Alaska statute specifies what must be done to appeal a decision from the Division regarding PFD eligibility. Specifically, AS 43.23.015(g) states that:

[i]f an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may, upon payment of a \$25 appeal fee, request the department to review its decision.²¹

Case law provides that when interpreting statutes such as this which allow for the review of decisions, such statutes must be construed with strict fidelity to their terms.²²

The question is whether reasonable cause exists for Mr. D's formal appeal request being filed nine days after the deadline. Mr. D did not address the issue of the untimeliness in his formal hearing request.²³ Nor did he provide any explanation at the hearing, but instead, focused on the substantive issues.

Here, however, Mr. D is an unrepresented *pro-se* applicant. His appeal was only nine days late. The Division has not asserted that it would be prejudiced by accepting the late-filed appeal. Because the issue on good cause was not sufficiently addressed on this record, this decision will address the merits of Mr. D's argument.²⁴

¹⁹ 15 AAC 05.010(b)(5).

²⁰ 15 AAC 05.030(k). The regulation appears to delegate the decision to the ALJ hearing the case.

²¹ AS 43.23.015(g).

²² *Stone v. I.N.S.*, 514 U.S. 386 (1995).

²³ Div. Ex. 8.

²⁴ *Cf.*, e.g., *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 204 P.3d 1023, 1029 (Alaska 2009) (holding that an applicant had good cause for six-day delay when applicant attempted to file but was erroneously turned away).

B. Application of AS 43.23.005(d)

The Alaska legislature has directed that “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 . . . (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.”²⁵ The statute counts prior convictions for criminal offenses committed on or after January 1, 1997.²⁶ Per regulations applying the statutory provisions, “incarcerated” is defined as:

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;²⁷

AS 43.23.005(d) and 15 AAC 29.993(a)(15) are both consistent in that the “incarceration” must occur *as a result of the conviction*. One question here is whether Mr. D’s pre-trial detention in 2019, weeks before his ultimate conviction in 2019 regarding 3AN-19-00000 CR can be said to be “as a result of” a misdemeanor conviction. It is a question that arises with some frequency.

The Department of Revenue addressed this issue long ago by promising to interpret the statute (or, more precisely, a similar prior version of the statute) such that all time served against a jail sentence would be deemed to have been served beginning on the date of conviction, and would be counted as jail time “as a result of” the conviction. The Department made this promise to the Alaska Supreme Court to avoid constitutional concerns about the statute, and the Supreme Court recorded the promise in its opinion upholding the statute. If the statute were interpreted otherwise, there could be disparate treatment of similarly-situated defendants: two defendants convicted of the same offense and given identical sentences might have different eligibility if one

²⁵ AS 43.23.005(d) (emphasis added). 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.

²⁶ Sec. 6 ch. 46 SLA 1996.

²⁷ 15 AAC 23.993(a)(15) (emphasis added).

had served the sentence before conviction and the other had made bail and therefore served it only after conviction.²⁸

The question is therefore whether Mr. D's 65 day detention from August 00 – October 00, 2019 is properly construed as being “incarcerated” and serving time in advance of his conviction, which is legally deemed to have occurred after his conviction, as interpreted and applied by the Alaska Supreme Court and the Department of Revenue. The answer to this question is determined by reviewing Mr. D's judgment of conviction and DOC's time accounting record. As those records demonstrate, Mr. D was sentenced to serve 120 days in jail and given credit for 65 days already served from August 00, 2019 until October 00, 2019.²⁹ As such, and as he has acknowledged, for purposes of AS 43.23.005(d), he was convicted *and* incarcerated for a misdemeanor during the qualifying year for the 2020 PFD, which is 2019.³⁰

Mr. D argues that per AS 43.23.005(d)(2), for purposes of determining his PFD eligibility, the Division is restricted to only considering his 2019 incarceration and conviction, not his earlier convictions. However, such a reading ignores AS 43.23.005(d)(2)(B)(ii). The full text of the statute makes clear that, incarcerations and convictions occurring in the qualifying year, as well as misdemeanors or convictions occurring in *prior* years, must be considered.³¹ In other words, an applicant is not entitled to focus on only certain words or phrases within statutory language, while ignoring others. Instead, a statute must be considered and interpreted in its entirety and read as a whole.³²

Further, Mr. D's asserted constitutional guarantees of due process and against double jeopardy are also inapplicable on these facts. Substantive due process is the constitutional doctrine that requires legislation to be fair and reasonable in content and to further a legitimate governmental objective.³³ Procedural due process is a constitutional protection that necessitates offering minimal requirements of notice and a fair hearing to an individual if the deprivation of a

²⁸ *State v. Anthony*, 810 P.2d 155, 162 (Alaska 1991). *See also* Memorandum from Deborah Vogt, Deputy Commissioner to Bob Cole, Director of Administrative Services, July 2, 1997 (discussing details of policy); *In re A.P.*, OAH No. 07-0343-PFD (2007).

²⁹ Div. Ex. 9, pp. 13-14; Div. Ex. 10, p. 1.

³⁰ AS 43.23.095(6).

³¹ AS 43.23.005(d)(2)(B)(ii) (emphasis added).

³² *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1127 (Alaska 2017).

³³ *Black's Law Dictionary* (11th ed. 2019).

significant life, liberty or property interest are at stake.³⁴ Finally, double jeopardy occurs when an individual is prosecuted twice for substantially the same offense.³⁵

But here, none of these doctrines is applicable. This proceeding involves Mr. D's entitlement to a PFD. It does not concern him being prosecuted or sentenced again for a crime for which he has already been charged or served time. Instead, he is simply being prevented from receiving his 2020 PFD, because of something that he did criminally. This is no different than other ways persons convicted of crimes may be restricted as to certain privileges, rights, and benefits, unrelated to the crime itself for which they have been convicted. For instance, as a matter of federal law, a convicted felon may not own a handgun.³⁶

Further, neither procedural nor substantive due process are at stake. Here, Mr. D not only informally challenged the denial of his 2020 PFD, but he has also now challenged the Division's denial through a formal hearing process. As such, he has been afforded significant procedural due process. As to his substantive due process rights, the Alaska Supreme Court has broadly upheld the Division's ability to uphold statutory and regulatory restrictions on individuals seeking to receive PFDs, including restrictions denying eligibility to incarcerated persons.³⁷ As a consequence, neither Mr. D's procedural nor substantive due process rights have been violated by the Division's determination that he is ineligible per the legislatively imposed restrictions contained in AS 43.23.005(d).

IV. Conclusion

Mr. D was incarcerated as the result of a misdemeanor conviction during the qualifying year as the Division has alleged. He was also previously convicted of two prior misdemeanors. Based on this and application of AS 43.23.005(d), he is ineligible to receive a 2020 PFD. The Division's decision is AFFIRMED.

DATED this 9th day of December, 2020.

By: Signed
Z. Kent Sullivan
Administrative Law Judge

³⁴ *Black's Law Dictionary* (11th ed. 2019).

³⁵ *Black's Law Dictionary* (11th ed. 2019).

³⁶ 18 U.S.C. 18 U.S.C. § 921, *et seq.*

³⁷ *Harrod v. State Dept. of Revenue*, 255 P.3d 991 (Alaska 2011); *Hertz v. Storer*, 943 P.2d 725 (Alaska 1997).

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 30th day of December, 2020.

By: Signed
Signature
Z. Kent Sullivan
Name
Administrative Law Judge
Title

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