

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

IN THE MATTER OF)
)
 B Q)
) Case No. OAH 07-0343-PFD
)
2006 Permanent Fund Dividend)

DECISION

I. Introduction

B Q timely applied for a 2006 permanent fund dividend. The Permanent Fund Dividend Division determined that Mr. Q was not eligible, and it denied the application initially and at the informal appeal level. Mr. Q requested a formal hearing by written correspondence.

The outcome of this case hinges on the interpretation of one particular statute, AS 43.23.005(d), which can be interpreted in two different ways. In a 1991 case before the Supreme Court, the Department of Revenue had stated how it intended to interpret the statute, and the court found the statute constitutional based on that representation. The department has interpreted the statute consistently with that representation to the court ever since. The PFD Division now suggests following the alternate interpretation. The administrative law judge recommends that the department adhere to its longstanding, court-approved construction of the statute, with the result that Mr. Q will qualify for a 2006 dividend, but not for a 2007 dividend.¹

II. Facts

The facts in this case are not in dispute. Mr. Q was arrested in 2005 on a felony charge and held in prison until his sentencing. On April 24, 2006, Mr. Q was sentenced to serve 17 years in prison for the 2005 offense, with credit for the time he had served in 2005. The division argues that Mr. Q is not eligible for a 2006 dividend because he was incarcerated during part of 2005. Mr. Q argues that he does qualify for a 2006 dividend because, although he had been incarcerated in the qualifying year, he had not been convicted or sentenced in 2005.

III. Discussion

This case is governed by AS 43.23.005(d), which states:

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 The division presented an argument very similar to this one in case number 06-0120-PFD. After the administrative law judge issued a proposed decision, the division settled that case and paid the applicant.

- (1) during the qualifying year, the individual was sentenced as a result of conviction in this state of a felony;
- (2) during all or part of the qualifying 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.

Interpretation of this statute only becomes an issue when a person is arrested, held in prison for some time in one year, and then convicted and sentenced in the next year and given credit for the time already served in the previous year. The question for PFD eligibility is whether the person was “incarcerated as a result of the conviction” in the first year or the second year. The actual incarceration was obviously in the first year, but at the time the defendant had not been convicted. This raises the question of whether incarceration can be the result of something that has yet to occur.

The department has traditionally deemed time in jail to commence at the time of sentencing, even if credit is given for time actually served in the previous year. In a 1997 memo to the Department of Corrections, a previous Deputy Commissioner wrote,

...the individual should be denied the dividend as of the date of sentencing, but not for the earlier year, even if the pre-conviction time was served in an earlier calendar year...while I fully agree that the incorporation of pre-conviction time in a sentence makes that time “served as a result of the conviction,” it should be counted as commencing on the date of sentencing, and not on the date that it was actually served.”²

As early as 1991, the department represented to the Supreme Court that this was the manner in which it would interpret the law. In *State v. Anthony*,³ the Alaska Supreme Court observed that

The trial court was specifically troubled by the fact that one of two individuals who are arrested at the same time for the same crime might receive a dividend while the other might not. This could occur, for example, if one cannot make bail and therefore spends ten days in jail. Later, both are convicted and sentenced to serve ten days in jail. The one who could not make bail gets credit for the time already served and therefore does not spend any time in jail as an incarcerated felon. The other is incarcerated and forfeits his or her dividend.

The state responds that both felons in the trial court's example would be ineligible for dividends. According to the state, even if an individual is sentenced only to "time served," the incarceration is deemed to have commenced on the date of sentencing and therefore will be deemed to have been served "as a result of the conviction."

² See attached memo from Deputy Commissioner of Revenue Deborah Vogt (July 2, 1997).

³ *State v. Anthony*, 810 P.2d 155 (Alaska 1991).

The division now argues that defendants should be deemed incarcerated as a result of conviction at the time they were actually in prison, even if they have not yet been convicted. No legal authority has been offered to support this substantial change in interpretation of the law. It does not appear that a court has taken issue with the previous interpretation. There is no evidence that the legislature has considered taking action to change the way in which the department has been applying the statute, even after publication of the *Anthony* case in 1991. The division has not discussed any policy considerations regarding interpretation of the statute.

The plain language of the statute could be reasonably regarded to support either interpretation. The division's recommended interpretation would result in significant changes to the groups of applicants who will qualify for dividends. The probable result overall would be that fewer applicants will qualify, which suggests that more funds would be available for the legislature to devote to the costs of the justice system and compensation of victims. However, for reasons discussed below, the actual savings could ultimately be less than what might be expected. Consideration of a number of different hypothetical situations illustrates the effects the new interpretation would have on various different categories of applicants.

Mr. Q's sentence is lengthy, and he was not released after arrest. It is not uncommon, however, for defendants charged with lower level felonies to serve a period of time, then to be released on bail and convicted and sentenced at a later time, possibly serving no more time than what they served initially. Other defendants who have the money will post bail immediately, and serve any time they are sentenced to after their sentencing.

Had Mr. Q been arrested in the middle of 2005 and served three or four months before being released on bail, and then sentenced to a probationary sentence in 2006 with credit for time served, under the division's new interpretation he would lose a 2006 dividend, and he would also lose a 2007 dividend under AS 43.23.005(d)(1) because he had been sentenced in 2006. In contrast, a defendant under identical circumstances who had the money to post bail immediately after arrest would serve his time in 2006, the same year as his sentencing, and lose only a 2007 dividend.

The newly offered interpretation also would result in fewer dividends being paid to applicants convicted of misdemeanors. When misdemeanor defendants are arrested they commonly serve a few days before making bail, and they then return to serve the balance of their jail time after the case has been resolved and they have been sentenced. For people arrested in the last few months of the year, this would result in the loss of two dividends, even for very short sentences.

A potential consequence of this new interpretation is that, when it becomes understood by defense lawyers in agencies that serve the indigent, defendants who have served only a few days late in the year will specifically request that judges not give them credit for the time served. For example, a defendant who has served two days in the previous year and is later sentenced to ten days total may elect to serve the full ten days without taking credit for the two already served. For many people who must interrupt their lives to serve time anyway, the value of a PFD is easily worth another couple of days, or more, in jail. Thus, the Department of Corrections may end up shouldering the costs of an increase in prisoner-days per year with no increase in the number of prison days actually sentenced by courts. Because the purpose of denying applications of people who have been incarcerated is in part to reimburse the state for the costs of incarceration,⁴ the new interpretation may not advance the statute's legislative intent as much as might be expected. It is not possible to calculate whether this would result in a significant impact, but it does show that any net gain from denying more dividends could turn out to be, at least in part, illusory.

The division's proffered interpretation would result in similarly-situated applicants being treated in a dissimilar manner. Assume in the following examples that all of the defendants are eventually sentenced to the same amount of time in jail for the exact same crime. Consider a defendant who is arrested and held in jail for a few days in January, who is later convicted and sentenced, and who completes all of his jail time in the same year he was originally arrested. This defendant would lose only one dividend. If this same defendant happened to be arrested in December instead of January, and was therefore tried, convicted, sentenced, and jailed for the balance of his sentence in the following year, he would lose two dividends. Also, if two identical defendants are arrested in December, but only one has enough money to immediately post bail, the richer defendant will lose only one dividend, because he will not be incarcerated at all during the year of the arrest. The poorer defendant will lose two dividends only because he does not have a credit card or ready access to some cash, a troubling result.

The policy change has additional implications for felons, who in all cases lose a PFD if they were sentenced during the qualifying year, regardless of whether they are incarcerated. Consider two felony co-defendants who are arrested and spend six months in jail before pleading guilty, at which time they are released pending their sentencing hearing. The first defendant is sentenced on December 31 to six months with credit for time served; the second is given the same sentence at the

⁴ AS 43.23.028(a)(5).
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next available time for a sentencing hearing, which is on January 2 of the next year. The first defendant will lose one PFD, the second will lose two, based on nothing more than the court calendar.

While the plain language of AS 43.23.005(d) could reasonably be read to support the division's new interpretation of that statute, the proposed interpretation is directly contrary to the department's earlier representation to the Alaska Supreme Court that it would deem incarceration to commence on the date of sentencing. A new interpretation could open constitutional questions that the court has settled based on the department's representations, and would differ from the long-established practices of the department. Under these circumstances, the better course of action is to continue with the established practice unless there are compelling legal or policy bases for a change. None are apparent in this case.

IV. Conclusion

Mr. Q's period of incarceration should be deemed to have commenced upon his date of sentencing in 2006. While this will make Mr. Q ineligible for a 2007 dividend, he remains eligible for a 2006 dividend.

V. Order

Upon adoption of this decision as the final administrative determination in this matter, the application of B Q for 2006 permanent fund dividend shall be GRANTED.

DATED this 25th day of October, 2007.

By: *Signed* _____
DALE WHITNEY
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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 28th day of November 2007.


By: Signed
Signature
Dale Whitney
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.]

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF REVENUE
OFFICE OF THE COMMISSIONER

TO: Bob Cole
Director, Div. Administrative Services
Department of Corrections

FROM: Deborah Vogel 
Deputy Commissioner

DATE: July 2, 1997

FILE:

TELEPHONE: (907) 465-2302

SUBJECT: Criminals and PFD's

RECEIVED
JUL 02 1997
ALASKA DEPT. OF REVENUE
PFD DIVISION
DIVIDEND APPEALS

Staff in the Permanent Fund Dividend Division brought to my attention an issue that may or may not be a problem in how we are mutually counting those folks who should be denied dividends, and whose dividends should then be instead forwarded to your department. The issue involves how to treat time served before conviction.

Our staff was told that your department intended to begin counting any pre-conviction time served as disqualifying time, so long as the time served was included in the eventual sentence. Thus, if a person were arrested and jailed for ten days, then tried some months later and convicted, sentenced to ten days, and given credit for time served, that person's dividend should be denied. I agree.

However, it's not completely clear to me how Corrections intends to apply this rule. If, for example, a person were arrested in November of Year 1, spent some time in jail in November, and then were not tried and convicted until Year 2, in our view that person is entitled to a dividend for the "qualifying year" of Year 1. We are under the impression that you may be intending to request the "Year 1" dividend. If so, we disagree.

In *State v. Anthony*, 810 P.2d 155 (Alaska 1991), the prisoners argued that a person (like the one described above, who is sentenced to ten days but has already served them) might be paid his dividend, while an exactly similarly situated person who made bail and didn't serve the pre-trial ten days would be denied his dividend. The court noted that "even if an individual is sentenced only to 'time served,' the incarceration is deemed to have commenced on the date of sentencing and therefore will be deemed to have been served 'as a result of the conviction.'" *Id.* at 161.

As I read that language, the individual should be denied the dividend as of the date of sentencing, but not for the earlier year, even if the pre-conviction time was served in an earlier calendar year.

Our problem is, of course, that as regards that first year, the individual is fully qualified for a dividend and may well have been actually paid the dividend by the time of the sentencing. It would no doubt be futile to try to collect the dividend back. Thus, while I fully agree that the incorporation of pre-conviction time in a sentence makes that time "served as a result of the

conviction," it should be counted as commencing on the date of sentencing, and not on the date that it was actually served.

I don't know whether we have an issue here or not -- as soon as the issue came to my attention, absolutely every one involved has been on leave. I finally spoke to Marilyn May, the Assistant Attorney General who handled the Anthony case. She agrees with the interpretation I have set out.

When you are back in the office, please give me a call and let me know if there is anything that we have to work out here.

Thanks.

cc: Marilyn May
Nanci Jones
Wendy Hughes