

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

In the Matter of	)	
	)	
E. G.	)	OAH No. 23-0197-PFD
	)	

DECISION

I. Introduction

The Permanent Fund Dividend Division (Division) denied E. G.’s 2022 application for the Permanent Fund Dividend (PFD) because he was incarcerated for a misdemeanor during the 2021 qualifying year, after having been convicted of two or more prior misdemeanors. Following an unsuccessful informal appeal, Mr. G. requested a formal hearing by written correspondence alleging that his 2022 application should have been approved because: (1) he was not incarcerated during the 2021 qualifying year; and (2) he did not have two prior misdemeanors during the period from January 1, 1997 through December 31, 2021 (“Relevant Time Period”).

The Division’s denial of Mr. G.s 2022 application is affirmed because he indeed had a disqualifying incarceration during the qualifying year and had two prior misdemeanor convictions during the Relevant Time Period.

II. Facts

Mr. G. filed an online application for the 2022 PFD on March 3, 2022.¹ The Division denied his application on August 12, 2022 on the grounds that he had been incarcerated during 2021 as the result of a misdemeanor conviction after being convicted of two or more prior misdemeanors.² Mr. G. filed a Request for Informal Appeal on September 11, 2022, claiming that he had not been incarcerated in 2021 but rather had been on Electronic Monitoring and that he had not been convicted of two or more prior misdemeanors. In his Informal Appeal, Mr. G. stated that he only had one prior misdemeanor conviction (a DUI in 2010) because he had been sentenced on the same day in

¹ Exh. 1, p. 1.

² Exh. 2.

2021 for two misdemeanors.³ One of these misdemeanors involved a DUI that occurred on December 30, 2020 (3AN-20-10000CR) while the other involved a DUI that occurred on October 23, 2018 (3AN-18-10000-CR).⁴ Mr. G.’s counsel in 3AN-18-10000CR was John Cashion while his counsel in 3AN-20-10166 was Joshua Fink. Mr. G. argued that since he had been sentenced for both misdemeanors on the same day, it was not accurate to say that he had “two or more *prior* convictions.”⁵ In support of his position, he pointed to an amendment to the Judgment for 3AN-20-10000CR which stated that he had 1 prior DUI.⁶

After receiving Mr. G.’s Informal Appeal, the Division submitted a Corrections Identification Verification Form to the Department of Corrections to verify that Mr. G. had been incarcerated during 2021 and that he had two prior misdemeanor convictions during the Relevant Time Period. The Division of Corrections completed that form on February 7, 2023, verifying that Mr. G. had been incarcerated during 2021 and that he had two prior misdemeanor convictions (3AN-10-00000CR and 3AN-18-10000CR) in addition to his conviction in 3AN-20-100000CR.⁷ After receiving this information, the Division issued an Informal Appeal decision upholding its denial of Mr. G.’s 2022 PFD application because he had been incarcerated in 2021 and had been convicted of two prior misdemeanors.⁸

Mr. G. filed a Request for Formal Hearing on March 9, 2022. In that Request, he argued that: (1) he did not have two or more *prior* convictions since he was sentenced for both misdemeanors (2020 and 2018) on the same day and thus only had one prior conviction (the 2010 misdemeanor); and (2) he was not incarcerated during 2021 because of a misdemeanor conviction “after being convicted of . . . two or more *prior* misdemeanors” during the Relevant Time Period.⁹

As part of the evidence in this case, the Division produced the audio recording from the court proceeding for 3AN-18-10000CR and 3AN-20-10000CR, which was held on

³ Exh. 3, pp. 1-2

⁴ Exh. 8, pp. 3-9.

⁵ See G. Exh. 1 (email dated May 9, 2023) in which Mr. G. notes there was “a single change of plea hearing” on September 8, 2021 with judgments entered in both cases that same day.

⁶ Exh. 3, pp. 3-5 (emphasis added).

⁷ Exh. 4, p. 4.

⁸ Exh. 5.

⁹ Exh. 6, p. 2 (emphasis added).

September 8, 2021.¹⁰ Both parties also produced documents in support of their respective positions.

III. Discussion

The Alaska legislature has directed that:

[A]n 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 a conviction in this state of a . . . misdemeanor if the individual has been convicted of . . . two or more prior misdemeanors as defined in AS 11.81.990.¹¹

Incarceration is defined by regulation as:

[C]onfine[ment] in . . . a setting under a court order for a conviction to restrain and individual's movement and freedom . . . or a non-penal setting monitored by an electronic device for the purpose of monitoring the individual's movements."¹²

Home confinement with electronic monitoring has been deemed to be "incarceration" in the context of a non-penal setting.¹³ Accordingly, Mr. G.'s argument that he was not incarcerated, as expressed in his informal appeal, has no merit.¹⁴

Since Mr. G. was "incarcerated" with the meaning of AS 23.005(d), the remaining question to be addressed is whether Mr. G.'s incarceration in 2021, which resulted from a conviction in Alaska of a misdemeanor in 3AN-20-10000CR and, if so, whether he has been convicted of two or more prior misdemeanors. The second question is the more difficult question given the content of two of the documents presented in this case.¹⁵

It is undisputed that Mr. G. was convicted on 00/00/2011 of a misdemeanor resulting from driving under the influence on November 24, 2010. This constitutes his first misdemeanor conviction.¹⁶ However, Mr. G. argues that his sentencing on 00/00/2021 with regard to 3AN-18-10000CR and 3AN-20-10000CR means that he had two simultaneous

¹⁰ See Exh. 11.

¹¹ AS 43.23.005(d); *see also* Division's Position Statement, p. 4. 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 where sentences greater than a year can be imposed. *See* AS 11.81.900(b)(24) & (37).

¹² 15 AAC 23.993(15); *see also* Division's Position Statement, p. 4.

¹³ *See In the Matter of S.O. E III*, OAN NO. 13-0107-PFD, p. 2 (finding that home confinement monitored by an ankle bracelet is incarceration by a furlough to a non-penal setting monitored by an electronic device).

¹⁴ Exh. 3, p. 2.

¹⁵ *See* Exh. 9.

¹⁶ *See* Exh. 8, pp. 7-9; *see also* Exh. 6, p. 4.

misdemeanors rather than another prior misdemeanor when he was sentenced in 3AN-20-10000CR. In support of his argument, he first points to the original judgment in 3AN-20-10000CR, which has a blank next to the line specifying whether there were prior DUI/OUI convictions and the later box that is checked off marking this as a “2nd offense.”¹⁷

Following this judgment, a member of the public contacted the Judge on 00/00/2021 about the judgment in 3AN-20-10000CR, noting that the Mr. G. had three DUI convictions. The member of the public also informed the judge that the original judgment in 3AN-20-10000CR needed to be corrected to reflect that Mr. G. had two prior DUI convictions – one in 3AN-10-00000CR and another in 3AN-18-10000CR -- in order to comply with certain provisions of the Anchorage Municipal Code.¹⁸ The Judge did issue an “amended judgment” on 00/00/2021 which stated that the judgment was “Amended to reference prior DOI/OUI conviction.”¹⁹ However, the amended judgment only reflects one prior DUI/OUI conviction and continues to designate the conviction in 3AN-20-10000CR as a “2nd offense.”²⁰ These two documents – the original judgment and the amended judgment in 3AN-20-10000CR -- form the basis for Mr. G.’s argument that he only had one prior misdemeanor conviction, not two.²¹

In response to Mr. G.’s argument that he did not have two *prior* misdemeanor convictions, the Division has pointed out that AS 43.23.005(g) provides guidance. AS 43.34.005(g) provides that the date the court imposes a sentence is the date of conviction and that “multiple convictions arising out of a single criminal episode shall be treated as a single conviction.”²² Here, the Division notes, there were two separate criminal episodes – the one on 00/00/2018, which gave rise to 3AN-18-10000CR, and the one on 00/00/2020, which gave rise to 3AN-20-10000CR. Under the PFD regulations, these two events, which were two years apart, do not constitute a single conviction because they arose out of two different criminal episodes.²³ However, this regulation still does not squarely address

¹⁷ See G. Exh 1, p. 1 (e-mail dated May 9, 2023); G. Exh. 2, p. 1 (e-mail dated May 16, 2023).

¹⁸ Exh. 8, pp. 1-4. The judgment in 3AN-18-10129CR reflected 1 prior DUI/OUI and stated that this was the 2nd offense, while the judgment in 3AN-20-10166CR also stated that this was a “2nd offense” but contained a blank next to the line designating whether there were any prior DUI/OUI convictions. Compare Exh. 8, pp. 3-4 with Exh. 8, pp. 5-6.

¹⁹ Exh. 3, p. 4.

²⁰ Exh. 3, pp. 4-5.

²¹ See Exh. 9.

²² Division’s Position Statement, p. 3.

²³ See AS 43.34.005(g).

whether 3AN-18-10000CR constitutes a “prior” conviction vis-à-vis 3AN-20-10000CR where, as here, both cases were decided on the same day during the same proceeding.

A review of the audio recording involving the plea and sentencing for each of these cases on September 8, 2021 provides clarity as to whether 3AN-18-10000CR constituted a “prior conviction.” Mr. G. had a different lawyer for each case. At the beginning of the hearing, the Judge stated that this was a sentencing hearing in both cases. She then said that she was starting “with the case that was first in time” and then went over a series of questions with Mr. G. before accepting a plea in 3AN-18-10000 from Mr. G., who was represented by John Cashion in that case. The Judge announced she was “switching to Case 20-10000”, before turning to Mr. G. and Joshua Fink, the lawyer representing him in 3AN-20-10000CR, regarding his plea in that case. The Judge did the same during the sentencing phase of the case: she heard the arguments of counsel in 3AN-18-10000CR before moving to the 3AN-20-10000CR and listening on the arguments of Mr. G.’s other attorney and counsel for the Municipality of Anchorage. She announced the sentence and conditions on 3AN-18-10000CR first before “moving on to 20-100000.” The Judge then discussed and announced the sentence and conditions on 3AN-20-10000CR. Thus, there were separate judgments and different penalties issued in each case, with a more substantial fine, longer monitoring, and a longer probation being imposed in the second case – consistent with 3AN-20-100000CR being a repeat offense after 3AN-18-00000CR.²⁴

Any ambiguity raised by the original and amended judgment in 3AN-20-00000CR concerning whether 3AN-18-10000CR constituted a “prior misdemeanor” is resolved by the audio recording of the proceeding. The judge consistently treated 3AN-18-10000CR as a separate case and handled the plea and later the sentencing in that case prior to turning to Mr. G.’s plea and subsequent sentencing in 3AN-20-10000CR.²⁵ As a result, the Division correctly concluded that Mr. G. had two prior misdemeanor convictions because the Judge issued a sentence in to 3AN-18-10000CR first before issuing a sentence in the second case (3AN-20-10000CR). These two prior convictions, when coupled with his 2021 incarceration, made Mr. G. ineligible to receive the 2022 PFD.

²⁴ See Exh. 11.

²⁵ During the proceeding, Mr. Cashion, who was representing Mr. G. on his 3AN-18-10000CR, referred to the second case (3AN-20-10000CR) as his “second offense” but noted that he had an earlier conviction. See Exh. 11.

IV. Conclusion

Mr. G. was incarcerated because of a misdemeanor conviction in 3AN-20-10000CR in 2021, the qualifying year for the 2022 PFD, after being convicted of two prior misdemeanors. Therefore, the Division's denial of Mr. G.'s 2022 PFD application is AFFIRMED.

Dated: July 13, 2023

SIGNED
Kathleen A. Frederick
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 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 7th day of August, 2023.

By: SIGNED

Signature

Christopher Kennedy & for Kathleen Frederick

Name

Administrative Law Judge

Title

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