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

In the Matter of	)	
	)	
K.O	)	OAH No. 22-0301-PFD
	)	

DECISION

I. Introduction

The Permanent Fund Dividend Division (Division) denied K.O's application for a 2021 Alaska Permanent Fund Dividend (PFD) because he was incarcerated for a misdemeanor during the 2020 qualifying year, after having been convicted of two or more prior misdemeanors. Following an unsuccessful informal appeal, Mr. O requested a formal hearing. A hearing was held on May 9, 2022, with an additional status conference held on June 23, 2022.

The Division's denial of Mr. O's application is affirmed because the evidence shows he did serve a period of incarceration during the 2020 calendar year, which rendered him ineligible for a dividend.

II. Facts

Mr. O was convicted of misdemeanors in 2003 and 2007.[1] He was also convicted of a misdemeanor in 2009 in Case No. 3PA-09-000CR and placed on unsupervised probation. In 2014, he was found to be in violation of his unsupervised probation in the 2009 case and was ordered to serve 30 days in jail on a petition to revoke probation.[2] In 2015, he appealed the sentence to the Alaska Court of Appeals.[3]

On July 19, 2019, the Court of Appeals affirmed the judgment of the district court but remanded the case back to the district court to correct the written judgment to comport with an oral sentence. A remand hearing was scheduled for October 19, 2019, but Mr. O

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1 The 2003 conviction was in Case No. 3PA-03-00000CR, and the 2007 conviction was in Case No. 3PA-07-00000. Ex. 4.

2 The motion to revoke probation in Case No. 3PA-09-000CR was based in part on new convictions against Mr. O for driving with a revoked license (DWRL) in Case No. 3PA-14-00000CR. Ex. 10. He was sentenced in the new case to 300 days with 180 days suspended (120 days to serve). Ex. 11. The 30-day sentence for the probation violation in Case No. 3PA-03-00000CR was to run consecutively to the sentence in the new case.

3 Mr. O also appealed the sentence in Case No. 3PA-14-00000CR. The appeals in the two cases were consolidated. Ex. 11.

did not appear, and a bench warrant was issued for his arrest.[4] On March 19, 2020, Mr. O was arrested and taken into custody, and the Department of Corrections (DOC) was directed to conduct a time accounting to determine the specific number of days Mr. O needed to serve for various infractions.[5]

A Correction Identification Verification Form provided by DOC to the PFD Division in February of 2022 indicated that Mr. O was incarcerated in Case No. 3PA-09-000CR from March 19, 2020 to April 6, 2020 for an FTA (failure to appear) charge.[6] Because the information showed he was incarcerated during 2020, the Division determined he was ineligible for a 2021 PFD.[7]

During his testimony, Mr. O admitted that he was incarcerated during 2020 but claimed the incarceration was in error because he had previously served the entirety of his sentence in Case No. 3PA-09-000CR, and he was deemed ineligible for a prior year's PFD because of it.[8] He testified that after he was taken into custody in March 2020, he contacted his lawyer, who in turn notified DOC that he had already served his sentence in Case No. 3PA-09-000CR. Then DOC, realizing its mistake, promptly released him.

Because Mr. O provided no documentation supporting his claim, and because of the significance of this issue to resolving his PFD case, the record was held open until June 8, 2022 to give the parties time to provide additional documentation clarifying whether Mr. O had already served the sentence in Case No. 3PA-09-000 before 2020. During the open period, Mr. Scott submitted an email and time accounting records from Correctional Center 1 (Correctional Center 1) Records Staff Sergeant Timothy Pines, indicating that an error had been made in the original time accounting for Mr. O.[9] Mr. Pines explained that although Mr. O had been incarcerated from March 19, 2020 to April 6, 2020, an advanced time accountant had reviewed his time sheets on April 6, 2020 and made corrections showing he

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4 Ex. 13, pp. 1-2.

5 Ex. 13, pp. 3-6; testimony of Peter Scott.

6 Ex. 4. Mr. Scott testified that the 19-day time period from March 19 through April 6, 2020 represents the 30 days Mr. O was sentenced minus time-off for good behavior. Testimony of Peter Scott.

7 In its position statement, the Division also filed a motion to dismiss Mr. O's informal appeal because it was 107 days late. The Division recognized, however, that the case should proceed to a hearing on the merits, because the denial of the application would be reversed if was determined that Mr. O had been incorrectly incarcerated. 15 AAC 23.183(a); testimony of Peter Scott.

8 The Division's records of Mr. O's application history show that he was deemed ineligible for a PFD in 2019, 2017, 2016, 2010, and 2008. Ex. 1, p. 5.

9 Ex. 15.

should only have been incarcerated from March 19, 2020 to March 20, 2020. Mr. Pines stated, "This means that from 03/21/2020 to 04/06/2020 he was incarcerated but this was in error and he should not have been and the time has not been used towards any sentence."

After the record in this case closed, a status conference was held on June 23, 2022 to discuss the new information from Mr. Scott. Mr. Scott participated in the status conference, but Mr. O did not.[10] Because the new information showed that Mr. O had still been incarcerated in Case No. 3PA-09-000 during the 2020 calendar year, albeit for only the two-day period from March 19 to March 20, 2020, the Division stood by its position that Mr. O was disqualified from receiving a 2021 PFD.

III. Discussion

As the person who requested the hearing, Mr. O has the burden of proving that the Division's decision to deny his application for a 2021 PFD was incorrect.[11] The Alaska legislature has directed that "an individual is not eligible for permanent fund dividend for a dividend year when. . . during all or a part of the qualifying year, the individual was incarcerated as a result of the conviction in this state of a . . . misdemeanor if the individual has been convicted of . . . two of more prior misdemeanors as defined in AS 11.81.900.[12] The qualifying year for a 2021 PFD was 2020.[13] Mr. O had been convicted of two misdemeanors before that year. Therefore, if he was incarcerated during all or a portion of 2020 as result of a misdemeanor conviction, he would not be eligible for a dividend.

Mr. O was convicted of misdemeanor charges in Case No. 3PA-09-000CR. The Correctional Center 1 records show that he was incarcerated in that case for the two-day period from March 19, 2020 to March 20, 2020. Mr. O submitted no documentary evidence to the contrary. It is immaterial that the incarceration period was only two days long, because eligibility for a PFD turns on whether Mr. O was incarcerated during any portion of the 2020

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[10] Mr. O was mailed a notice of the status conference, which informed him that he should confer with the Division and contact the Office of Administrative Hearings if he was unable to attend the conference. He was called twice at the time of the scheduled status conference, but he did not answer the phone and did not return a voicemail message that was left for him.

[11] 15 AAC 05.030(h).

[12] AS 43.005(d). The statute counts prior convictions for misdemeanors committed on or after January 1, 1997. Sec. 6, ch. 46, SLA1996 (quoted in editor's note to AS 43.23.005).

[13] AS 43.23.095(6).

qualifying year. Coupled with his two prior misdemeanors, his incarceration in 2020 disqualifies him from receiving a 2021 PFD.

Despite this conclusion, if Mr. O obtains written documentation from DOC in the future that shows DOC incorrectly identified him as being incarcerated during 2020, he may provide that information to the Division for consideration and potential reversal of the denial of his application pursuant to 15 AAC 23.183(a).

IV. Conclusion

Mr. O was incarcerated during 2020 as a result of a misdemeanor conviction after having been convicted of at least two prior misdemeanors. Mr. O has failed to meet his burden of proving that the Division's denial of his 2021 PFD application was incorrect. The Division's denial of the 2021 application is AFFIRMED.

Dated: July 29, 2022

Signed

Lisa M. Toussaint
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 23rd day of August, 2022.

By: *Signed*
Lisa M. Toussaint
Administrative Law Judge

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