

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BRIAN A. ROSS, and)
A., M. and E.)
ROSS (minor children),)
)
Appellants,)
)
v.)
)
STATE OF ALASKA,)
DEPARTMENT OF REVENUE,)
)
Appellee.)
_____)

Case No. 3AN-10-7051 CI

ORDER ON APPEAL

Lieutenant Colonel Brian Ross, appellant, applied for a 2009 Permanent Fund Dividend (“PFD”). He also sponsored the applications for his three children, A., M. and E. The PFD Division (“Division”) denied Lt. Col. Ross’ application pursuant to AS 43.23.008(c), and subsequently denied the applications of his minor children because they found Lt. Col Ross to not be an eligible sponsor. Lt. Col. Ross filed an informal appeal of the State’s denial of his dividend and his children’s dividend on September 10, 2009. After a dividend technician upheld the State’s eligibility determination, Ross requested a formal hearing for all denials on December 26, 2010. The Office of Administrative Hearings held a formal hearing on February 16, 2010. Administrative Law Judge Jeffrey Friedman upheld the denial of the Ross’ dividends. The Commissioner of Revenue affirmed the ruling on April 1, 2010. Lt. Col. Ross appeals the Commission’s decision and challenges the constitutionality of AS 43.23.008.

I. Factual Background

Lieutenant Colonel Brian Ross was born and raised in Alaska. After graduation from high school in Anchorage, he left the state in 1990 to attend the United States Naval Academy. Since graduating from the Naval Academy, Lt. Col. Ross actively serves in the United States Marine Corps. He completed two tours of combat duty in Iraq and teaches American Military History at his alma mater. Lt. Col. Ross has not lived in Alaska since his graduation.

In 1996, the State instructed Ross to “provide documentation that demonstrates to the department’s satisfaction an intent at all times during your absence to return to Alaska and remain permanently in Alaska.”¹ At that time, Ross demonstrated that he maintained his legal residence in Alaska, possessed an Alaska’s driver license, voted in Alaska elections, registered two vehicles in Alaska, and purchased resident hunting and fishing licenses during his return to trips to Alaska while on leave. Ross explained that he could not be transferred to Alaska as an active duty U.S. Marine officer because there is not a Marine Corps base in Alaska. From 1990 to 2008, Brian spent a total of 354 days in Alaska. He received a dividend from 1982 until 2009.

The State denied Lt. Col. Ross a permanent fund dividend in 2009, determining Ross was ineligible because he was absent from Alaska more than 180 days in qualifying year 2008. Because Lt. Col. Ross’s minor children did not have an eligible sponsor, the State also determined the Ross children ineligible. Lt. Col. Ross qualified for the previous ten dividends under the military allowable absence.² However, in 1998 the Alaska State Legislature amended the eligibility requirements for the dividend. The amended law provides that an otherwise eligible individual who has been eligible for the preceding 10 dividends despite being absent from the state for more than 180 days in each of those years is only eligible for the current year dividend if the individual was absent 180 days or less

¹ Ex. 1

² See AS 43.23.008(a)(3).

during the qualifying year.³ The law took effect January 1, 1999 and was codified in AS 43.23.008, making the 2009 PFD application period the first in which the ten year rule would be applied. In his decision affirming the denial of the Ross' dividends, ALJ Friedman stated that Lt. Col. Ross continues to be a resident of Alaska and "there is no question that he does intend to return to and remain indefinitely in Alaska when he retires."⁴

II. Standard of Review

The Court applies its independent judgment to administrative determinations.⁵ Ross, however, does not dispute any of the facts of the case in the administrative review of his application. Instead, Ross challenges the constitutionality of the statute governing permanent fund dividend eligibility requirements. The Court applies "the substitution of judgment standard to issues of law not involving agency expertise, such as statutory interpretation and constitutional claims."⁶

III. Legal Argument

Alaska Statute 43.23.095(7) defines "state resident" for PFD purposes as "an individual who is physically present in the state with the intent to remain indefinitely...or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state." An individual remains eligible for the PFD if he is a resident and is absent only for the reasons excused by the Legislature in AS 43.23.008. The list of allowable absences includes:

(1) receiving secondary or postsecondary education on a full-time basis;

...

(3) serving on active duty as a member of the armed forces of the United States or accompanying, as that individual's spouse, minor dependent, or disabled dependent, an individual who is

³ 20th Legislature, House Bill 2, Chap. 44 SLA 98.

⁴ Decision of ALJ Jeffrey Friedman, February 18, 2010, at 2.

⁵ See *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

⁶ *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1128 (Alaska 1999).

- (A) serving on active duty as a member of the armed forces of the United States; and
- (B) eligible for a current year dividend;
- ...
- (9) serving as a member of the United States Congress;
- (10) serving on the staff of a member from this state of the United States Congress;

AS 43.23.008(a). In 1998, the Legislature amended the allowable absences to add a limitation to the number of dividends an absent individual could receive. The amendment (hereby referred to as the “ten-year rule”) was effective January 1, 1999 and first made applicable to the 2009 PFD. The ten-year rule, codified in AS 43.23.008(c) provides:

An otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years is only eligible for the current year dividend if the individual was absent for 180 days or less during the qualifying year. This subsection does not apply to an absence under (a)(9) [serving as a member of Congress] or (10) [serving on the staff of a member of Congress from this state] of this section or to...accompany an individual who is absent under (a)(9) or (10) of this section.

In this appeal, Ross challenges both the “ten-year rule” codified in AS 53.23.008(c) and the exception to the rule for Congressmen and their staff.

First, Ross argues that AS 43.23.008 violates the Equal Protection clause by providing an exception to the 10-year rule for Congressmen and their staffers but not providing an exception for military service men and women. He argues that the State has no legitimate purpose in making a distinction between the two groups. Second, Ross argues that the exception is a violation of substantive due process because it “shocks the universal sense of justice.” Next, Ross argues that his conduct preceding the passage of the 10 year rule—i.e., electing to attend the Naval Academy—“has been given a significance that it did not possess before the passage of the ten year rule” and therefore the law as applied to him is

unconstitutionally retrospective. Finally, Ross contends that the letter the State sent him in 1996 regarding eligibility requirements estopped the State from changing eligibility as to him.

A. The State Did Not Deny the Rosses Equal Protection

Alaska has adopted a sliding scale approach to equal protection cases.⁷ Under the sliding scale, “[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.”⁸ The Alaska Supreme Court has held that an individual’s interest in a PFD is “merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis.”⁹ The Alaska Supreme Court has found the purpose of the permanent fund’s eligibility rules—to prevent fraud, encourage permanent Alaska residency, and simplify the State’s adjudication procedures—legitimate.¹⁰ Accordingly, any eligibility requirements are valid if the state can show they “bear a fair and substantial relationship” to the accomplishment of this purpose.¹¹

Ross argues that AS 43.23.008 violates the equal protection clause because the law excludes one group (Alaska congressmen and their staff) from the ten-year eligibility rule without a legitimate government purpose.¹² Ross essentially claims that the exception to the ten-year rule is discriminatory because other groups of Alaskans are frequently absent from the state, including servicemen, peace corps officers, state employees, family caregivers, medical patients, students, and Olympians. Ross, however, did not posit any concrete examples where a member of one of these groups—outside of military servicemen—has also

⁷ *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978).

⁸ *State, Dep’t of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993).

⁹ *Underwood v. State*, 881 P.2d 322, 325 (Alaska 1994) (quoting *Anthony*, 810 P.2d at 158).

¹⁰ *Cousins v. State*, No. S-9280, 2001 WL 34818200, at *4 (Alaska May 9, 2001).

¹¹ *Id.*

¹² The State does not challenge Ross’ standing in this case, but the Court notes that even if it finds the exception to be unconstitutional, the ten-year rule would still apply to Ross and, therefore, the Court could not grant Ross the relief he seeks, i.e., a 2009 PFD and any future dividends.

been denied a PFD, or why a member of one of these groups could not return to Alaska at least once every 10 years for 180 days to fulfill the eligibility requirement. To the contrary, ten years seems like a reasonable limit to eligibility for all these groups. It seems at least rare that a Peace Corps officer would serve for more than ten years and that a student could not reasonably complete his or her undergraduate and graduate studies within ten years. Regardless, the State is not constitutionally required to extend the congressional exception to the ten-year rule to servicemen.

Under the minimum scrutiny analysis, the Court will “not determine if a regulation is perfectly fair to every individual to whom it is applied.”¹³ In *Cousins v. State*, the Cousinses challenged a Department of Revenue regulation excluding applicants caring for ailing relatives from allowable absences as impermissibly “creating elite classes of citizens who are allowed longer absences.”¹⁴ Like the Cousinses, Ross essentially argues that he and his family are in a class of people denied equal protection because they did not receive dividends while a class of people absent for excused reasons—Congressmen and their staff—did receive dividends. Finding that PFDs “represent only an economic interest,”¹⁵ the Alaska Supreme Court was not persuaded by this argument. The Supreme Court reiterated that the purpose of eligibility requirements “to ensure that only permanent residents receive dividends” is a legitimate government purpose and that “allowing only enumerated excusable absences...bears a fair and substantial relationship to ensuring that the dividend goes only to permanent residents.”¹⁶

Ross also challenges the ten-year rule as unconstitutionally distinguishing residents who are in-state versus residents who are out-of-state under an excusable allowance. Ross claims that because he has ties to Alaska and has not established a permanent residence outside of Alaska, he should be found eligible for the PFD.

¹³ *Cousins*, 2001 WL 34818200 at *4; *Eldridge v. State*, 988 P.2d 101, 104 (Alaska 1999).

¹⁴ *Id.* at *3.

¹⁵ *Id.* at *4.

¹⁶ *Id.* (quoting *Church*, 973 P.2d at 1130-31).

He emphasizes the ALJ’s finding that there is “no question that [Ross] does intend to return” to Alaska. Ross argues that consideration of residency for the PFD should be the same consideration of state residency under AS 01.10.055, which focuses on an individual’s subjective intent to remain, and would therefore apply equally to all “residents” regardless of the amount of time spent away from the state. The Alaska Supreme Court has previously rejected this argument, however, and held that PFD eligibility requirements “may differ from other residency requirements.”¹⁷ Just as in *Cousins*, the Court is sympathetic to the Rosses’ circumstances as their record and argument strongly demonstrates their passion for retaining residency in Alaska. However, the minimum scrutiny analysis does not require that the eligibility requirements are “perfectly fair to every individual to whom it is applied,”¹⁸ including Lt. Col. Ross and his family. In addition, cutting off discretionary review of applicants who have been outside the state more than 180 days for ten consecutive years “is a reasonable and efficient way to limit PFD eligibility to permanent residents.”¹⁹

B. The Ten-Year Rule Does Not Violate Substantive Due Process

Ross also asserts that excluding servicemen from the exception to the ten-year rule—or applying the rule to servicemen—violates substantive due process. “The standard for establishing a substantive due process violation is rigorous.”²⁰ To succeed on a due process claim, the state’s actions must be “so irrational or arbitrary or so lacking in fairness as to shock the universal sense of justice.”²¹ The Alaska Supreme Court, however, has held that “dividend eligibility requirements do not reach the level of unfairness necessary to support a due process violation,”²² and has upheld various eligibility requirements despite noting

¹⁷ *Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 733 n. 12 (Alaska 1995).

¹⁸ *Cousins*, 2001 WL 34818200 at *4 (quoting *Church*, 973 P.2d at 1130-31).

¹⁹ *Id.*

²⁰ *Church*, 973 P.2d at 1130.

²¹ *Id.* (quoting *Application of Obermeyer*, 717 P.2d 382, 386-87 (Alaska 1986)).

²² *Id.*

they may be “unfair” to certain classes of applicants.²³ Because “some bright line rules are necessary to allow for the efficient distribution of dividends and to ease the administrative burden of determining eligibility for a PFD,” the requirements are “a reasonable way to ensure that only legitimate permanent residents receive PFDs.”²⁴ By the same token, Ross and his family have benefited from the bright line statutory rule allowing for “excusable absences,” that has undoubtedly excluded other Alaska residents who are not military servicemen, members of their family, or belonging to one of the other excused groups. While it may be bad policy—as Ross argues—to extend application of the ten-year rule to U.S. Marines who, in particular, are incapable of being transferred to Alaska during active service, this argument is a policy argument best addressed within the political process.

C. AS 43.23.008 is not an *Ex Post Facto* law

Ross next argues that AS 43.23.008 constitutes an *ex post facto* law in violation of the Alaska Constitution.²⁵ An *ex post facto* law is one that is passed ““after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.””²⁶ One inquiry into whether a statute is unconstitutionally retrospective is “whether the statute affects vested rights.”²⁷ Throughout his briefing, Ross argues that his right to a permanent fund dividend is undeniable. Ross had nothing more, however, than an “inchoate expectancy” of a PFD.²⁸ Because the “dividend program is a creature of the legislature” and can be abolished at any time, no Alaska resident has a vested right in a permanent fund dividend.²⁹ Even though the statutory change to the dividend program disappoints Ross’s economic expectations, AS 43.23.008 does

²³ See, e.g., *Cousins*, 2001 WL 34818200; *Church*, 973 P.2d 1125.

²⁴ *Church*, 973 P.2d at 1130 (internal quotations omitted).

²⁵ See Article I § 15.

²⁶ *Underwood*, 881 P.2d at 327 (quoting *Danks v. State*, 619 P.2d 720, 722 n. 3 (Alaska 1980)).

²⁷ *Id.*

²⁸ *Id.* at 327 n. 5.

²⁹ *Id.* at 327 n. 7.

not constitute an impermissible *ex post facto* law in violation of the Alaska Constitution.³⁰

D. The State is not estopped from denying Ross his PFD

Finally, Ross argues that the State should be estopped from applying the ten-year rule as to him because he acted in detrimental reliance on correspondence he had received from the Department of Revenue regarding eligibility requirements. The correspondence at issue is a 1996 Adult Eligibility Questionnaire from the Department of Revenue, which advised Ross that in order to continue to qualify for his dividend he would need to “provide documentation that demonstrates to the department’s satisfaction an intent at all times during [his] absence to return to Alaska and remain permanently in Alaska.”³¹ The State, however, in no way guaranteed that Ross would continue to receive the Permanent Fund Dividend indefinitely.

Ross also argues that when he made the decision to leave in Alaska in 1990, he relied on the eligibility requirements imposed at that time which required him to be physically present in the state at some point from July 1 two years before the date of application. Although Ross received his dividend without living primarily in Alaska for 18 years after his decision to leave, Ross took a risk that his receipt of dividends may eventually end by moving away from Alaska for school and joining the Marine Corps. While the anticipation of an annual deposit from the State may have been a consideration when he was a high school senior, the Court cannot believe that the loss of an uncertain and unvested amount of money nineteen years later would have prevented Ross from making the invaluable decision to proudly serve his country.

II. Conclusion

³⁰ See *Id.*; *Property Owners Ass’n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989)).

³¹ Appellant’s Excerpt of Record at 1.

The State's amendment to the permanent fund eligibility statute, AS 43.23.008(c), requiring applicants to not be absent from Alaska 180 days per year for more than ten consecutive years is not a violation of Lt. Col. Ross' constitutional rights. The ten-year rule, and its exception for Congressmen and their staff, is a reasonable eligibility requirement that bears a fair and substantial relationship to the efficient administration of the dividend program and to ensuring that only bona fide residents are eligible for dividends. In addition, the State is not equitably estopped from denying Ross and his children 2009 dividends and any future dividends for which the applicants are ineligible according to the statute. Accordingly, the Court hereby **AFFIRMS** the State's determination to deny Ross and his family permanent fund dividends in 2009.

ORDERED this 13th day of May, 2011, at Anchorage, Alaska.

Signed

ANDREW GUIDI
Superior Court Judge

I certify that on 5/13/11
a copy of the above was mailed to
each of the following at their
addresses of record:

W. Ross/AG

Signed

Jackie Kapper, Judicial Assistant