

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

BRIAN ROSS,

Defendant.

Case No. 3AN-11-11280

FILED  
AUG 14 2012  
CLERK OF SUPERIOR COURT  
THIRD JUDICIAL DISTRICT  
ANCHORAGE, ALASKA

**ORDER RE: APPEAL FROM OFFICE OF ADMINISTRATIVE HEARINGS**

At issue is appellant Lieutenant Colonel Brian Ross's January 20, 2012 appeal from ALJ Jeffrey A. Friedman's July 29, 2011 decision to deny the 2010 Permanent Fund Dividend (PFD) eligibility for Lt. Col. Ross and his three minor children (collectively "Lt. Col. Ross"). The State filed an appellee brief on March 27, 2012. Lt. Col. Ross did not file a reply. The appeal is now ripe.

**I. FACTS AND PROCEDURAL HISTORY**

In 2009, Lt. Col. Ross applied for a PFD. He also sponsored the applications for his three children, Andrew, Matthew and Emily. The PFD Division (hereinafter "Division") denied Lt. Col. Ross' application pursuant to AS 42.23.008(c), because Lt. Col. Ross was absent from Alaska for more than 180 days during each of the preceding 10 years. The Division in turn denied his children's applications because Lt. Col. Ross was not an eligible sponsor. Lt. Col. Ross' absence from Alaska was due to his service as a commissioned officer in the Marine Corps and being posted outside Alaska for lengthy periods.

Lt. Col. Ross appealed the Division's original decision via an informal agency appeal; the Division upheld its decision. Lt. Col. Ross then filed a formal appeal pursuant to AS 43.23.015(g), and Lt. Col. Ross was given a formal hearing before the Alaska Office of Administrative Hearings. ALJ Friedman upheld that 2009 PFD denial. Having at that point exhausted all administrative proceedings, Lt. Col. Ross appealed to the Superior Court in accordance with AS 44.62.560. On May 13, 2011, Superior Court Judge Andrew Guidi affirmed the denial of Lt. Col. Ross' 2009 PFD eligibility. Judge Guidi held that the amendment to AS 43.23.008(c), which requires that applicants not be absent from Alaska 180 days per year for more than ten consecutive years, did not violate Lt. Col. Ross' constitutional rights.<sup>1</sup> Judge Guidi also held that 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.<sup>2</sup> Finally, Judge Guidi held that the State was not equitably estopped from denying Lt. Col. Ross his 2009 dividends and any future dividends for which Lt. Col. Ross is ineligible.<sup>3</sup>

Lt. Col. Ross moved for reconsideration. On June 7, 2011, Judge Guidi denied Lt. Col. Ross' motion for reconsideration, and again held that the exception for congressmen and their staff are rational requirements that bear a fair and substantial relationship to the purpose for which the law was enacted.<sup>4</sup> Judge Guidi also noted that even if he were to conclude that the exception for congressmen is invalid, the ten-year rule would still bar Lt. Col. Ross' 2009 PFD eligibility.<sup>5</sup> On June 27, 2011, Lt. Col. Ross

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<sup>1</sup> Order on Appeal, *Ross v. State Dept. of Revenue*, 3-AN-10-7051 CI, 9 (May 13, 2011).

<sup>2</sup> *Id.* at 9-10.

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2.

appealed Judge Guidi's decision to the Alaska Supreme Court. The Supreme Court has not yet rendered a decision.

On March 21, 2010 -- three months before appealing the 2009 PFD eligibility decision to the Alaska Supreme Court -- Lt. Col. Ross filed applications for the 2010 PFD for himself and his three children. The Division again denied his eligibility because Lt. Col. Ross was absent from Alaska for more than 180 days each year during 1999-2008, and because Lt. Col. Ross was also absent from Alaska more than 180 days during the qualifying year (2009). The Division also denied all three of Lt. Col. Ross' children's applications, again because Lt. Col. Ross was not an eligible sponsor. As in 2009, Lt. Col. Ross filed an informal appeal of the 2010 PFD decision, and the Division upheld its decision to deny Lt. Col. Ross' 2010 PFD eligibility. Lt. Col. Ross then filed a formal appeal, and as in 2009, his 2010 appeal was heard by ALJ Friedman. ALJ Friedman again upheld the Division's decision, and further held that the arguments raised in Lt. Col. Ross' 2010 PFD appeal are essentially the same as his 2009 arguments. ALJ Friedman stated that:

[a]lthough he remains an Alaska resident, Lt. Col. Ross is not eligible for a 2010 PFD because he has been absent from the state for more than 180 days in each of the ten previous qualifying years and remained absent for more than 180 days in 2009, the qualifying year for a 2010 PFD. His children are not eligible for a 2010 PFD because they do not have an eligible sponsor.<sup>6</sup>

Lt. Col. Ross appealed the 2010 PFD decision to this court. This appeal is now ripe.

## II. ANALYSIS

Lt. Col. Ross appeals the Division's decision for this court to determine whether the denial of his 2010 PFD eligibility constitutes a violation of his constitutional rights,

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<sup>6</sup> Ross, OAH No. 11-02222-PFD, 4 (July 29, 2011).

and whether the ten-year rule is constitutional. Because Lt. Col. Ross raises issues of statutory interpretation and constitutional claims and not issues of agency expertise, this court applies the “substitution of judgment” standard of review.<sup>7</sup>

The ten year rule, as codified in AS 42.23.008(c), states that:

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.<sup>8</sup>

Lt. Col. Ross first argues that the ten-year rule violates the Alaska and United States Constitutions’ Equal Protection clauses. Second, he argues that the ten-year rule violates substantive due process. Third, that the ten-year rule constitutes an ex post facto law. Fourth, that the State should be estopped from denying him the 2010 PFD because he reasonably and detrimentally relied on the eligibility requirements before the ten-year rule was added in 1990. Fifth, that the grant of PFD privileges to congressmen and their staff, to the exclusion of all other classes, violates the republican form of government guaranteed by Article IV, section 4 of the United States Constitution. Sixth, that the denial of his PFD eligibility violates the Privileges or Immunities clause of the United States Constitution. Seventh, that ALJ Friedman erred when he twice stated that Lt. Col. Ross remains an Alaskan resident but is nonetheless ineligible for the PFD. Finally, Lt. Col. Ross argues that even if this court finds the ten-

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<sup>7</sup> See *Handley v. State Dept. of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

<sup>8</sup> AS 42.23.008(c).

year rule constitutional, this court may and should still award Lt. Col. Ross his PFD in equity.

#### **A. Issues previously addressed by Judge Guidi**

This court has reviewed the briefs from Lt. Col. Ross' 2009 PFD appeal to Judge Guidi and has found that Lt. Col. Ross' first four arguments in the instant appeal are nearly identical to his 2009 appeal points.

##### **i. The ten-year rule does not violate either the Alaska or United States Equal Protection clause**

Judge Guidi found that AS 43.23.008 does not violate the Equal Protection clause of the Alaska Constitution because a PFD represents an economic interest, and that the eligibility requirements for receiving a PFD survive the minimum scrutiny analysis required under Alaska's Equal Protection clause.<sup>9</sup> While Judge Guidi's decision did not expressly address whether the PFD eligibility requirements violated the Equal Protection clause of the United States Constitution, the Alaska Supreme Court has stated that "Alaska's Equal Protection clause is more protective of individual rights than the federal Equal Protection clause."<sup>10</sup> This court agrees with and adopts Judge Guidi's conclusion that the ten-year rule does not violate the Equal Protection set forth in the Alaska Constitution. That in turn leads this court to the conclusion that the ten-year rule does not violate the United States Constitution.

##### **ii. The ten-year rule does not violate substantive due process**

The next issue Lt. Col. Ross raised in his 2009 appeal to Judge Guidi and now in the instant 2010 appeal is whether the ten-year rule violates substantive due process. Judge Guidi found that in *Church v. State Dept. of Revenue*, the Alaska Supreme Court

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<sup>9</sup> *Ross v. State Dept. of Revenue*, 3AN-10-7051CI, 5 (May 13, 2011).

<sup>10</sup> *State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

addressed this issue when it held that “the dividend eligibility requirements do not reach the level of unfairness necessary to support a due process violation.”<sup>11</sup> In addition, Judge Guidi noted that “this argument is a policy argument best addressed within the political process.”<sup>12</sup> This court agrees with Judge Guidi’s reasoning and conclusion. This court therefore finds that the ten-year rule does not violate Lt. Col. Ross’ substantive due process.

**iii. The ten-year rule does not constitute an ex post facto law**

Lt. Col. Ross argues that the ten-year rule is illegally retrospective legislation because it is impossible for him to comply with the new law and still keep his military career. This court again agrees with Judge Guidi’s analysis on this issue, and finds that the ten-year rule does not violate the Alaska Constitution’s prohibition of ex post facto laws.

**iv. The State is not estopped from applying the ten-year rule to Lt. Col. Ross**

Lt. Col. Ross also argues that his detrimental reliance on the 1990 PFD eligibility requirements estops the State from applying the ten-year rule as to him. This court agrees with Judge Guidi’s reasoning that:

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.<sup>13</sup>

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<sup>11</sup> *Church v. State Dept. of Revenue*, 973 P.2d 1125 (Alaska 1999).

<sup>12</sup> *Ross v. State Dept. of Revenue*, 3AN-10-7051 CI at 5 (May 13, 2011).

<sup>13</sup> *Id.* at 9.

This court therefore finds that the State is not estopped from applying the ten-year rule to Lt. Col. Ross.

**B. Lt. Col. Ross' argument that the ten-year rule violates the republican form of government guaranteed by Article IV, Section 4 of the United States Constitution**

In addition to the issues previously addressed by Judge Guidi, Lt. Col. Ross raises four additional arguments in his appeal to this court. Lt. Col. Ross first argues that the ten-year rule violates the Guarantee Clause of the United States Constitution. Alaska Rule of Appellate Procedure 602(c)(1)(A) requires that the appellate court only consider points included in the statement of points, unless the party moves to supplement the statement.<sup>14</sup> Lt. Col. Ross did not raise this argument in his initial statement of points, nor did he file a motion to supplement his statement of points. He instead first raised it in his opening brief to this court, at page 10. This court therefore denies Lt. Col. Ross' appeal based on the ten-year rule's constitutionality under the Guarantee clause of the United States Constitution.<sup>15</sup>

**C. The ten year rule does not violate the Privileges or Immunities Clause**

Lt. Col. Ross next argues that the ten-year rule violates the Privileges or Immunities clause because Lt. Col. Ross is denied the same rights of other Alaskan citizens, even though he is a bona fide resident. The Fourteenth Amendment of the United States Constitution prohibits states from making or enforcing any law "which shall abridge the privileges or immunities of citizens of the United States."<sup>16</sup> In *Saenz v.*

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<sup>14</sup> Alaska R. App. P. 602(c)(1)(A).

<sup>15</sup> This court also notes the Alaska Supreme Court's decision in *Delahay v. State*, where the Court stated that "it has long been the law that questions arising under the guarantee of a republican form of government are political, not judicial, which is to say that Congress decides whether a form of government is republican." 476 P.2d 908, 912 (Alaska 1970).

<sup>16</sup> U.S. CONST. Amend. XIV.

*Roe*, the United States Supreme Court recognized that the right to travel provided by the Privileges or Immunities clause includes the right of a U.S. citizen to “become a citizen of any State of the Union by a bona fide residence therein, and with the same rights as other citizens of that state.”<sup>17</sup> In *Saenz*, the Court held unconstitutional a California law denying welfare benefits to persons who had lived in the state for less than 12 months.<sup>18</sup> The Court stated that its reasoning was in part based on the fact that “there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile.”<sup>19</sup> The *Saenz* Court was addressing the issue of rights guaranteed to all residents that would not be easily transferred to and enjoyed in other states.

Both prior to and after the *Saenz* decision, our Alaska Supreme Court has addressed this issue. In 1995, our court stated that “eligibility for PFDs includes meeting a definition of residency tied to physical contact to the state, which may be more difficult to meet than the definition of residency for other purposes.”<sup>20</sup> One year following the *Saenz* decision, the Alaska Supreme Court in *Schikora v. State Dept. of Revenue* explicitly interpreted the *Saenz* decision and held that the PFD is a “readily portable benefit of which states may apply durational residency requirements to establish an applicant’s ‘bona fide’ intent to be a state resident.”<sup>21</sup> This court therefore finds that the ten-year rule does not violate the Privileges or Immunities clause of the United States Constitution.

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<sup>17</sup> *Saenz v. Roe*, 526 U.S. 489, 503 (1999).

<sup>18</sup> *Id.* at 492.

<sup>19</sup> *Id.* at 505.

<sup>20</sup> *Brodigan v. Alaska Dept. of Revenue*, 900 P.2d 728, 733 n.12 (Alaska 1995).

<sup>21</sup> *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 946 n. 30 (Alaska 2000) (citing *Saenz*, 526 U.S. at 504-05).



**D. ALJ Friedman's determination that Ross is a resident of Alaska is not relevant in determining whether his PFD should be denied**

Lt. Col. Ross also argues that ALJ Friedman erred in determining that even though Lt. Col. Ross is a resident of Alaska, Lt. Col. Ross and his three children are nevertheless ineligible for the 2010 PFD. As mentioned previously, the Alaska Supreme Court has held that PFD eligibility requirements "may differ from other residency requirements."<sup>22</sup> This court holds that ALJ Friedman did not err in determining that Lt. Col. Ross is a state resident but not eligible for the PFD.

**E. This court does not have the equitable power to award Lt. Col. Ross' 2010 PFD**

Lt. Col. Ross' final argument is that this court has the power to award Lt. Col. Ross his 2010 PFD, despite this court's finding that the ten-year rule is constitutional and that Lt. Col. Ross is therefore ineligible to receive his PFD. Lt. Col. Ross' argument is based on AS 22.10.050, which vests this court with the "power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction according to the constitution, the laws of the state, and the common law."<sup>23</sup> This court, however, "must not apply equity to do indirectly 'what the law or clearly defined policy forbids to be done directly'."<sup>24</sup> Because this court finds that the ten-year rule is unambiguous as to whether Lt. Col. Ross is eligible for the 2010 PFD, this court does not have the power to grant Lt. Col. Ross his PFD in equity. But even if this court does have such power, this court elects not to exercise that discretion to grant the PFDs to Lt. Col. Ross.

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<sup>22</sup> *Brodigan*, 900 P.2d at 733 n.12 (Alaska 1995).

<sup>23</sup> AS 22.10.050.

<sup>24</sup> *Riddell v. Edwards*, 76 P.3d 847, 855 (Alaska 2003) (quoting *Marsh v. Edelstein* 9 Cal. App. 3d. 132, 140 (1970)).

**III. CONCLUSION**

In conclusion, this court agrees with and adopts Judge Guidi's analysis regarding Lt. Col. Ross's first four arguments. In addition, this court finds that the ten-year rule does not violate the Guarantees clause or the Privileges or Immunities clause of the United States Constitution. This court also finds that the issue of whether Lt. Col. Ross meets the residency requirements for Alaska differs from the eligibility requirements for the PFD, and that Lt. Col. Ross does not meet the eligibility requirements to receive a 2010 PFD. Finally, this court finds that the ten-year rule is unambiguous as to Lt. Col. Ross's eligibility and therefore that this court does not have and/or elects not to exercise that power to grant Lt. Col. Ross the equitable relief he seeks. Accordingly, this court **AFFIRMS** the Division's and ALJ Friedman's determination that Lt. Col. Ross and his three children are ineligible for the 2010 PFD.

**IT IS SO ORDERED.**

DATED at Anchorage, Alaska this 13<sup>th</sup> day of August, 2012.

  
Gregory A. Miller  
Superior Court Judge

I certify that on 8/14/12  
a copy of the above was mailed to:

A. Stanley  
Judicial Administrative Assistant

R. Wayne  
M. Barber