

ALASKA SUPREME COURT

February 24, 2011

Oral Argument Case Summary

CASE #1

Richard Heller, Appellant, v.
State of Alaska, Department of Revenue, Appellee.

Supreme Court No. S-13551

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ATTORNEYS

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- *Attorneys for Appellee, State of Alaska, Department of Revenue:*

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QUESTIONS PRESENTED ON APPEAL

- ✓ Did the State of Alaska, Department of Revenue, err in denying a 2007 Permanent Fund Dividend to Richard Heller, a military serviceman who established residency in Alaska but physically resided in the state for only two months before being deployed overseas?
 - Did the Department of Revenue correctly interpret PFD statutes when it found Heller ineligible for an “allowable absence” because he did not physically reside in the state for at least six months before leaving the state?
 - Do PFD statutes requiring Heller to physically reside in Alaska for six months before claiming an “allowable absence” during the qualifying year discriminate against him in violation of his constitutional rights to equal protection, to interstate travel, and to keep and bear arms?

MAJOR AUTHORITIES TO CONSIDER

U.S. Constitution

- **Second Amendment.** Right to keep and bear arms.
- **Fourteenth Amendment.** Equal protection.

U.S. Supreme Court Case Law

- ***Zobel v. Williams***, 457 U.S. 55 (1982)
- ***Hooper v. Bernalillo County Assessor***, 472 U.S. 612 (1985)
- ***Attorney General of New York v. Soto-Lopez***, 476 U.S. 898 (1986)
- ***Saenz v. Roe***, 526 U.S. 489 (1999)

Alaska Constitution

- **Article 1, section 1.** Equal rights, opportunities and protection.
- **Article 1, section 19 (Amended 1994).** Right to keep and bear arms.

Alaska Statutes

- **AS 01.10.055.** Residency
- **AS 43.23.0005.** Permanent Fund Dividend—Eligibility
- **AS 43.23.008.** Permanent Fund Dividend—Allowable Absences

Alaska Supreme Court Case Law

- ***Brodigan v. State, Dept. of Revenue***, 900 P.2d 728 (Alaska 1995)
- ***Church v. State, Dept. of Revenue***, 973 P.2d 1125 (Alaska 1999)
- ***Schikora v. State, Dept. of Revenue***, 7 P.3d 938 (Alaska 2000)
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SUMMARY OF THE CASE

Richard Heller arrived in Alaska on June 17, 2005, under assignment to the 172nd Stryker Brigade. He registered to vote, obtained an Alaska driver's license, and designated Alaska as his state of residence in his military records. Less than two months later—on August 14, 2005—he was deployed to Iraq, where he served until his return to Alaska on December 11, 2006. He has resided in Alaska ever since, continuing in the military until his honorable discharge in December 2007, then attending the University of Alaska in both Fairbanks and Anchorage.

In March 2007, Heller applied for a 2007 Permanent Fund Dividend. To be eligible for a PFD, he was required to meet the requirements of AS 43.23.005, which include:

- ✓ Being a state resident on the date of application (AS 43.23.005(a)(2));
- ✓ Being a state resident during the entire qualifying year (2006) (AS 43.23.025(a)(3)); and
- ✓ Being physically present in the state during the qualifying year (2006) unless eligible for an “allowable absence” (AS 43.23.025(a)(6)).

Heller was in Iraq during most of 2006—the qualifying year—and was not physically present in Alaska. To be eligible for a PFD, he must show that he is entitled to an “allowable absence.” While “serving on active duty as a member of the armed forces of the United States” is included on the list of activities and circumstances under which an absence during the qualifying year may be allowed,¹ Heller’s PFD application was denied under the following provision:

“An individual may not claim an allowable absence under (a)(1)-(16) of this section unless the individual was a resident of the state *for at least six consecutive months immediately before leaving the state.*”²

Essentially, the Department of Revenue determined that Heller did not live in Alaska long enough before leaving for Iraq to qualify for an exception to the PFD’s physical residency requirements. Heller claims that the Department’s decision is incorrect for two major reasons.

First, Heller argues that the “allowable absence” statute permits a member of the armed forces to claim an absence of up to 180 days *in addition to any claim based on active duty* for “any reason consistent with the individual’s intent to remain a state resident.”³ Unlike the allowable absence for active duty service itself, a claim under the “any reason” provision does not trigger the six-month residency requirement. If granted to Heller, this 180-day allowable absence for “any reason” would more than offset the four-month shortfall between the time he left Alaska in August 2005 and the time he would have completed six months of residency in December 2005.

Second, Heller argues that the PFD statutes themselves are unconstitutional to the extent they allow the State to deny Heller’s PFD. The six-month residency prerequisite for claiming an allowable absence discriminates against him based on his length of residency, in violation of his right to equal protection, his right to interstate travel, and his right to keep and bear arms.

DECISIONS BELOW

Heller first presented his appeal to State of Alaska Administrative Law Judge Christopher Kennedy, who ruled against him on December 27, 2007.⁴ He then appealed to the Alaska Superior Court. Fairbanks Superior Court Judge Douglas L. Blankenship ruled in the State’s favor in a decision issued on May 11, 2009.⁵ This appeal to the Alaska Supreme Court followed.

¹ AS 43.23.008(a)(3).

² AS 43.23.008(b) (emphasis added).

³ AS 43.23.008(17)(A).

⁴ *Decision and Order*, OAH No. 07-0677-PFD, Appellant’s Excerpt of Record at pages 10-12.

⁵ *Memorandum Decision and Order*, Case No. 4FA-08-01193 CI (Administrative Appeal), Appellant’s Excerpt of Record at pages 15-32.

LEGAL ISSUES GENERALLY

Statutory Interpretation

Heller's Position. In Heller's view, there are two "allowable absence" provisions applicable to his case that, in combination, support his eligibility for a 2007 PFD notwithstanding his physical absence from Alaska for most of the qualifying year. The "any reason" provision, which has no six-month residency prerequisite, should be interpreted to permit him an allowable absence for the period between his departure from Alaska on August 14, 2005, and the date he would have fulfilled the six-month physical residency requirement had he not been deployed: December 17, 2005. The "active duty" provision would then be triggered, to permit him an allowable absence from the time he satisfied the six-month residency requirement until he returned to Alaska on December 11, 2006.

Heller asserts that the legislative history of AS 43.23.008(a)(17) demonstrates that the legislature intended to enact a "pro-military" provision that would allow men and women in the armed forces to be absent for a wide range of undefined reasons as long as they intended to return to Alaska. He cites legislative testimony indicating that the "any reason" provision was intended to "cover people called to active duty unexpectedly," and to treat "active duty...like being in the state."

State's Position. In the State's view, Heller's interpretation of the "any reason" provision is too broad. The provision was enacted to allow military members to retain eligibility if "recalled unexpectedly to active military duty after they had been absent for another reason that was not inconsistent with residency." Under the wording of the statute, to qualify for the additional "any reason" absence, they would first have to qualify for the "active duty" absence, which Heller failed to do. According to the State, it strains reason to suggest that the legislature intended to eliminate the six-month residency requirement in determining allowable absences for military personnel; if the legislature had intended the "any reason" absence of up to 180 days to offset the six-month residency requirement, it could have clearly said so. According to the State,

Under Mr. Heller's proposed interpretation...a person who moved to Alaska for only one day, six months prior to the commencement of the qualifying year, quickly established "paper ties," then left the state for any of the reasons provided in AS 43.23.008(a) would be eligible for a dividend. This is exactly what the legislature sought to avoid.

Constitutional Claims

Heller's Position. Heller claims that, even if the PFD statutes have been interpreted properly, they are unconstitutional to the extent they require Alaska residents like Heller to physically reside in the state for six months before being eligible to claim an allowable absence. In his view, the six-month prerequisite creates a “durational residency requirement” that treats him differently from his fellow Alaska residents solely on the basis of his length of residency.

Historically, state laws that attempt to penalize newer residents in favor of older residents have been found to violate the equal protection and citizenship clauses of the Fourteenth Amendment to the U.S. Constitution. For example, Alaska's original PFD program based the amount of individual dividends on the number of years each recipient lived in the state. In the case of *Zobel v. Williams*,⁶ the U.S. Supreme Court struck down this structure because it impermissibly rewarded longer-term residents for past residency alone, effectively creating a form of tiered citizenship based on length of stay.

Heller points out that, since the *Zobel* decision, the U.S. Supreme Court has invalidated state laws that distinguish between long- and short-term residents in the awarding of tax exemptions,⁷ civil service employment preferences,⁸ and welfare benefits.⁹ The nation's highest court has specifically confirmed that the Fourteenth Amendment “does not provide for, and does not allow for, degrees of citizenship based on length of residence.”¹⁰ Further, the court has stated:

The State may not favor established residents over new residents based on the view that the State may take care of ‘its own,’ if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's ‘own’ and may not be discriminated against solely on the basis of their arrival in the State after (a certain date).¹¹

According to Heller, Alaska's equal protection clause should also be interpreted to bar the six-month physical residency requirement, since the Alaska Supreme Court has ruled that it protects “Alaskans’ right to non-discriminatory treatment more robustly than...the federal equal protection clause.”

And finally, Heller claims that the six-month durational residency requirement discriminates against him for exercising his right to keep and bear arms, both individually and as part of a “well-regulated militia” under both the federal and state constitutions. Joining the military and deploying to Iraq entailed his

⁶ 457 U.S. 55 (1982)

⁷ *Hooper v. Bernalillo County*, 472 U.S. 612 (1985)

⁸ *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986)

⁹ *Saenz v. Roe*, 526 U.S. 489 (1999)

¹⁰ *Saenz v. Roe* at page 506.

¹¹ *Hooper v. Bernalillo County* at page 623.

exercise of these important constitutional rights, and the PFD requirements that penalize him for doing so should be ruled unconstitutional.

State's Position. In the State's view, the U.S. Supreme Court decisions Heller cites are not helpful to his claim. The laws struck down in those cases created distinctions between newcomers and long-term residents that were permanent and unchangeable, not distinctions that apply to a single qualifying year only and do not prevent future benefits. Also, PFD cash payments are "portable" benefits for which durational residency requirements are more broadly appropriate, to ensure against abuse by non-residents seeking benefits designed for residents only.

Also, Heller ignores a line of decisions by the Alaska Supreme Court that have recognized the legitimacy of durational residency requirements in the PFD context.¹² The court has recognized that the state has a legitimate interest in ensuring "that only permanent residents receive dividends,"¹³ and has upheld the 180-day general residency requirement of the PFD program because it bears a "fair and substantial relationship" to furthering the state's interest in issuing PFDs to bona fide residents only.¹⁴ In the State's view, requiring applicants who claim allowable absences during the qualifying year to demonstrate six months of physical residency "prior to leaving" also bears a fair and substantial relationship to furthering the State's interest. The six-month rule reasonably distinguishes between residents who maintain close and recent ties to Alaska and those who don't; it does not unfairly discriminate against short-term residents in favor of long-term ones. To the contrary, even long-time Alaskan residents can be denied PFDs if they are outside the state too long in the qualifying year without an allowable absence,¹⁵ and even long-term residents are bound by the six-month rule that Heller challenges.

Further, the Alaska Supreme Court has recognized that a PFD is "merely an economic interest...entitled to only minimum protection under our equal protection analysis." Even though PFD eligibility criteria may impact Heller's right to travel, right to keep and bear arms, and other rights of citizenship, the impacts are minimal and do not outweigh the State's legitimate interest in ensuring that PFDs go to permanent residents only.

The State concludes:

While sympathetic to the circumstances of individuals like Mr. Heller and his laudable commitment to serving in the armed forces, this Court is not tasked with determining, nor can the State be expected to craft, eligibility schemes that are "perfectly fair to every individual to whom it is applied"

¹² See, for example, *Church v. State*, 973 P.2d at 1130; *Schikora v. State*, 7 P.3d at 944-945.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

under minimum scrutiny. Alaska Statute 43.23.08(b) applies to all applicants that want to qualify for a dividend while absent from the state for more than 180 days during the qualifying year. Nowhere does the statute draw the impermissible distinctions that Mr. Heller's arguments suggest. Because the provision is designed to ensure that dividend recipients are legitimate state residents and to prevent fraud and bears a fair and substantial relationship to that objective, Mr. Heller fails to establish that AS 43.23.008(b) is unconstitutional.

QUESTIONS FOR STUDENTS TO CONSIDER

1. Each of the three branches of government has a role in the PFD program. Name the three branches and the respective role each plays.
2. Which branch established the six-month residency rule at issue in this case? Why do you think the rule was adopted? What are the advantages of the rule? What are the disadvantages? Do you agree that the rule reflects good public policy? Why or why not? If not, what rule would you adopt instead?
3. The constitutional "right to travel" is a major issue in this case, yet neither the federal nor state constitution specifically refers to a "right to travel." What is the source of this right in the federal constitution? What is the source in the state constitution?
4. Heller is disputing eligibility for a 2007 PFD, and the litigation over his claim has been ongoing for several years. Discuss possible impacts of a decision in Heller's favor. Are these impacts limited to Heller alone?
5. Heller claims that the PFD statutes deny him equal protection under Alaska's Constitution. Read the parties' arguments on this issue on pages 30-44 of Appellant's Brief, pages 17-20 of Appellee's Brief, and pages 13-14 of Appellant's Reply Brief. Based on these arguments, describe the "sliding scale" levels of scrutiny the Alaska Supreme Court uses to evaluate equal protection claims under our state constitution.
 - What level of scrutiny does Heller urge the court to invoke, and why?
 - What level of scrutiny does the State urge the court to invoke, and why?
 - What level of scrutiny do you think should apply?
 - How might the level of scrutiny applied by the court affect the outcome of the case?

6. Following the rule of law means looking to the law and the facts of a case to determine the outcome, not personal views, political influence, or public pressure. What are your personal views about whether Heller should be eligible for a dividend? Why? Do your views differ from the criteria for eligibility found in Alaska statutes? If so, how? Can you think of other legal questions where your personal views or sympathies might favor an outcome that differs from what the law requires?