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MEMORANDUM

March 18, 2011

SUBJECT: Equal Protection Concerns -- HB 190
(Work Order No. 27-LS0564M)

TO: Representative Eric Feige
Attn: Michael Paschall

FROM: Lisa Moritz Kirsch
Legislative Counsel



I spoke to Michael Paschall on the phone about equal protection concerns for this bill. After I spoke with him about the possible problems I did additional research. Equal protection is an area where judges often disagree (I have noted an unusually high number of concurring and dissenting opinions), which makes it difficult to predict the outcome in specific cases. However, I believe the requirement that service members receive dividends for three years in order to get the benefit of the exception to the ten-year rule may create problems.

Under the state equal protection clause, a statute is evaluated on a sliding scale under which the goal of the legislation and the importance of the individual rights affected are considered.¹ As the importance of the individual rights affected increases, then the burden increases on the state to show that the state's goal justifies the intrusion on the individual's interests in equal treatment and that the state's goal is substantially related to the means chosen to achieve the goal. An individual's interest in receiving a permanent fund dividend is accorded a low level of protection under the state equal protection clause, because only an economic interest is implicated and that interest is not based on the need of the applicant.² At the low end of the scale, the state must show the enactment is fairly and substantially related to a legitimate state interest.

The primary state concern in granting PFDs is that the recipient of a PFD is a bona fide resident of the state. To be an Alaska resident a person must have the intent to remain in Alaska indefinitely. The state has a legitimate interest in preventing temporary residents motivated by the financial benefit from making false claims of residency. To separate these two groups, the state currently uses various indicia of residency including a

¹ *State v. Anthony*, 810 P.2d 155 (Alaska 1991); *State, Dept. of Transportation v. Enserch Alaska Const., Inc.*, 787 P.2d 624 (Alaska 1990).

² *Underwood v. State*, 881 P.2d 322 (Alaska 1994).

durational residency requirement of one year to determine whether an applicant has the intent to remain.³

The statutory change in HB 190 creates two applicant classes who are treated differently: (1) applicants who qualify for allowable absences, but are subject to the ten-year limit, (2) active duty service members who received three dividends in Alaska before being inducted into the military, who are not subject to the ten-year limit, and continue to receive PFDs based on allowable absences. The question here is whether the state's interest in granting PFDs only to residents with a genuine intent to remain in the state is fairly and substantially related to a limitation of ten years for allowable absences unless you are on active duty or in Congress, or the spouse, dependent, or staff of someone in Congress or on active duty.

Arguably, members of Congress and active duty military are somewhat unique in that their career choices put them in the position of serving government in a place other than their chosen state of residence. Also, Congressional and military service are more likely to span a term longer than a decade when compared with education or illness related absences. This particular question of differential treatment for members of Congress has not been addressed by the courts, and although the result of a court's equal protection analysis is particularly difficult to predict, at this low level of scrutiny it seems likely that the nexus between the state's purpose of excluding long absent residents who no longer intend to return and the means of providing the exception to members of the military and Congress is sufficiently close to be found constitutional.

However, there is also an equal protection issue raised by the requirement that military members were residents long enough to receive three PFDs before they were inducted. The issue of durational residency has been addressed by the courts. In *Zobel v. Williams*, the United States Supreme Court invalidated a prior scheme of PFD distribution rewarding residents incrementally higher dividends based on the length of their residency in Alaska.⁴ That Court held that the state could not distinguish between old and new residents in this way without violating the federal equal protection clause.⁵

In *Zobel*, the Court did not invalidate a threshold waiting period like the one proposed in this bill or under existing AS 43.23.005(3), and the concurring opinions in *Zobel* acknowledge that some durational residency requirements may be constitutional.⁶ In other cases, residency requirements appear to be generally disfavored, but have been upheld where the individual interest is less significant and the state interest bears a

³ AS 43.23.005.

⁴ *Zobel v. Williams*, 102 U.S. 2309, 72 L.Ed.2d 672 (1982).

⁵ *Zobel v. Williams*, 102 U.S. at 2315.

⁶ *Zobel* at 2318 and 2322, n. 8.

substantial relationship to the requirement.⁷ Although I have not done exhaustive research, there appears to be a general trend to limit durational requirements to one year. For example, in an unreported opinion Judge Dana Fabe (now an Alaska Supreme Court Justice) disallowed a two-year residency requirement, but upheld a one-year requirement.⁸ In this opinion she found that:

The problematic provision of this statute is the two-year residency requirement. One-year residency requirements have been found to be rationally related to a state's purpose to establish bona fide residency. The United States Supreme Court has affirmed a one-year residency or waiting requirement for in-state tuition, upholding lower court findings that it is reasonable to presume that a person who has not resided within a state for a year is a non-resident[.]⁹

Although the majority rejected the argument, an alternative constitutional argument addressed in the concurring opinions in *Zobel* was that durational residency requirements ran afoul of the privileges and immunities clause, or "the right to travel." It seems unlikely that the right to travel could be applied here because both classes affected by the exception to the ten-year rule are residents, and the impairment of rights can be cured whereas the invalidated distinctions between residents in *Zobel* were permanent.¹⁰

Here it could be argued that a three-year durational requirement is substantially related to the state's legitimate interest in establishing that a service member who has been out of the state for half of the year for ten years still has the intention to return. A service member who was well established in Alaska through several years of residency before joining the military may have lasting contacts that will induce permanent residency. The state has a legitimate interest in preventing fraudulent claims of residency, but whether three years of dividend eligibility to establish intent to return after ten years of long

⁷ *Church v. State, Dept. of Revenue*, 973 P.2d 1125 (1999); *Schikora v. State, Dept. of Revenue*, 7 P.3d 938 (Alaska 1991) (no more than 180 days out of state upheld); *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975) (one year residency for divorce jurisdiction upheld), *But see, State v. Adams*, 522 P.2d 1125 (Alaska 1974) (one year residency found unconstitutional; state interests in regulating divorce did not outweigh litigant's interest in access to the courts).

⁸ *Lindley v. Malone*, 3AN-90-2821 CI (July 18, 1990).

⁹ Citing, *Starns v. Milkerson*, 401 U.S. 985 (1971); *Sturgis v. Washington*, 414 U.S. 1057 (1973).

¹⁰ For example, residents present in the state at statehood would have received a larger PFD forever.

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absences will justify the infringement of the rights of a service member with only two years of eligibility and thwart an equal protection challenge is unclear.¹¹

Please feel free to contact me if you have questions, or want me to draft an amendment to remove the three-year eligibility requirement.

LMK:plm

11-160.plm

¹¹ It is worth noting that service members must qualify for the initial dividend, so a member who has received a PFD for three years has four years of residency.