

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION**

In the Matter of the)
C. J.) OAH No. 05-0806-PFE
_____) Agency No. 5845211741

DECISION & ORDER

I. Introduction

C. J. appealed the Alaska Commission on Postsecondary Education’s claim against her 2005 permanent fund dividend (PFD). The commission staff filed a Motion Requesting Summary Adjudication, arguing essentially that Ms. J.’s remaining student loan debt exceeds the 2005 PFD and that the loan is in default. Ms. J. responded to the motion, objecting on financial grounds to the burdens of having her PFD garnished and asserting, without providing specific facts, that she “ha[s] never and would never default on a loan....”¹

The commission staff’s motion should be granted. Ms. J. has not disputed the material facts showing that the PFD amount claimed by the commission is greater than the amount she owes. This is so whether the amount she owes is considered the accelerated balance of the loan or a lesser amount agreed upon in settlement of the commission’s claim.

II. Facts

In August 2000, Ms. J. and the commission’s executive director agreed to settle the commission’s claim for repayment of Ms. J.’s student loan debt. Specifically, they agreed that the commission would accept assignment of Ms. J.’s PFDs “for the next five (5) years, through 2004, in lieu of regular payments as settlement of the debt.”² The commission estimated that this would reduce by approximately 50 percent the then-\$20,783 debt.³

¹ J.’s November 30, 2005 Response to Motion.

² See August 25, 2000 Letter from Barrans to J. (responding to August 13, 2000 Letter from J. to Barrans, offering five years’ PFDs, beginning with the 2000 PFD). In her November 30, 2005 Response to Motion, Ms. J. described the arrangement as covering the 1998 through 2003 PFD, stating that this “made it that I would receive my dividend back in 2004.” Prepared as they were at the time the agreement was made, the August 2000 letters are better evidence of the terms of the agreement than a recollection written in response to a motion more than five years later. The Barrans letter describes the PFDs in question as those “for the next five (5) years, through 2004 ...”; the J. letter describes them as the PFDs “for the next five years” and states that “[t]he 2000 dividend would count as year one”

³ August 25, 2000 Letter from Barrans to J. (stating that “[i]n accepting this settlement, and estimating annual PFD at approximately \$2000, the Commission would be settling for approximately 50% of the amount you owe at this time and waiving future interest”).

Apparently due to an oversight or some confusion, Ms. J. did not assign her 2002 dividend to the commission.⁴ The commission's collections supervisor notified Ms. J. of the failure to assign the 2002 PFD and offer her two options to cure the problem: (1) pay the commission the \$1,540.76 amount of the 2002 PFD and continue under the original agreement (i.e., to assign dividend through 2004) or (2) amend the agreement to assign Ms. J.'s 2003-2006 PFDs to the commission.⁵ In her response, Ms. J. rejected the first option, argued that she had effectively signed over five PFDs already, if two pre-2000 PFDs were counted, and inquired about whether medical cancellation of her debt might be an option.⁶ Ms. J. went on to write that if medical cancellation were denied, "then I request that we extend the agreement until such time as the balance of the 2002 dividend has been paid."⁷

The commission's collections supervisor replied, characterizing Ms. J.'s failure to assign the 2002 PFD as a breach of the agreement.⁸ That reply again offered to amend the agreement as in option 2 above (i.e., PFD assignments for 2003-2006) and also offered as an alternative the option to pay the cash equivalent of the PFDs in lieu of assigning them.⁹ The reply also described the process for Ms. J. to request medical cancellation.¹⁰

In September 2005, Ms. J. filed a Notice of Defense requesting a hearing on the commission's claim against her 2005 PFD. She marked the box stating that "[t]he amount the Commission claimed from my Alaska PFD is greater than the accelerated, total loan balance amount I owe."¹¹ She added that she "was supposed to be paid off with [her] 2004 dividend and begin getting them in 2005."¹² She did not mark either of the boxes meant to raise a dispute

⁴ See May 1, 2003 Letter from Fishel to J.; also J.'s November 30, 2005 Response to Motion (acknowledging that she received the 2002 dividend).

⁵ May 1, 2003 Letter from Fishel to J..

⁶ June 6, 2003 Letter from J. to Alaska Commission on Postsecondary Education.

⁷ Id.

⁸ June 19, 2003 Letter from Fishel to J. at p. 1.

⁹ Id.

¹⁰ Id. at pp. 1-2.

¹¹ September 20, 2005 Notice of Defense at p. 1. The Notice of Defense form the commission apparently provided to Ms. J. for use in requesting a hearing expresses the ground for disputing the claim in terms of the amount claimed being greater than "the accelerated, total loan balance" It should be noted that the law speaks not to the relationship between the PFD amount claimed and "the accelerated, total loan balance" but rather to the relationship between the PFD amount claimed and "the amount owed by the borrower" See AS 43.23.067(c)(3). In Ms. J.'s case, this variation between the form's statement and the statute's language did not create a problem. Ms. J. was able to articulate the reasons she disputed the claim without being thrown off by the variation. The commission staff may want to reconsider the language used in the form, and conform it more closely to the statutory language, to avoid confusing other borrowers in future cases.

¹² Id.

about the default status of the loan.¹³ She also added a note suggesting that she understood the commission's collections supervisor to have said that she would have completed paying off the loan when she gave up her 2004 PFD.¹⁴

In its motion, the commission's staff argued that the commission can garnish Ms. J.'s 2005 PFD as a matter of law because she breached the five-PFDs settlement agreement by failing to assign the 2002 PFD, did not cure the breach by paying \$1,540.76 (the amount of the 2002 PFD), and did not accept the offer to amend the agreement to add the 2005 and 2006 PFDs to cover the missed 2002 PFD payment.¹⁵ The motion also acknowledged that the commission did receive Ms. J.'s 2003 and 2004 PFDs.¹⁶

Ms. J. acknowledged in her response to the motion that she (rather than the commission) received her 2002 PFD.¹⁷ She implied that she thought she got the 2002 PFD because she "had written [the commission's executive director] asking her if [she, Ms. J.] could have [her] dividend back again."¹⁸ Ms. J. acknowledged that she received "no response" from the executive director.¹⁹

III. Discussion

By law, the commission is allowed to take a student loan borrower's PFD when the loan is in default.²⁰ When the commission makes a claim against a PFD, it must provide the borrower with an opportunity for a hearing on the claim, but the grounds on which the borrower can challenge the claim are limited to just three:

1. the commission did not send a notice of default in compliance with the law;
2. the notice of default has been rescinded;
3. "the amount owed by the borrower is less than the amount claimed from the permanent fund dividend."²¹

¹³

Id.

¹⁴ Id. at p. 2 (stating "I do not appreciate feeling like the deal I made was considered void when Matthew [presumably Fishel] said all I had to do was give up my 2004 and I would be done paying off my loan").

¹⁵ See Commission Staff's November 21, 2005 Motion Requesting Summary Adjudication at p. 1.

¹⁶

Id.

¹⁷ J.'s November 30, 2005 Response to Motion (explaining that the 2002 PFD was deposited in her account).

¹⁸

Id.

¹⁹

Id.

²⁰ AS 14.43.145(a)(2); also AS 43.23.067.

²¹

See AS 43.23.067(b)&(c).

Even if the borrower owes less than the PFD amount, the commission can collect the owed amount from the borrower's PFD by amending its claim to the lesser amount.²²

In her Notice of Defense, Ms. J. invoked the third ground, essentially asserting that she owes nothing more and that the commission cannot take her 2005 PFD. Though she included a general statement in her response to motion to the effect that she has not defaulted and never will default on loans, she did not (there or in the Notice of Defense) assert that the commission has failed to send her a notice of default or has rescinded the notice of default. Instead, Ms. J.'s case comes down to a very narrow question: Does she owe the commission anymore money since the commission has received her 2004 PFD, even though it did not receive the 2002 PFD?

Because the commission's staff has requested summary adjudication, first it is necessary to determine whether the question can be decided on the law and the record, without an evidentiary hearing. An administrative appeal can be decided on summary adjudication (i.e., without an evidentiary hearing) if no material facts are disputed.²³ The only facts that are material to the question Ms. J. has raised are undisputed.

First, Ms. J. does not dispute that she and the commission agreed to her paying off her student loan by assigning her 2000-2004 PFDs to the commission. No matter how much or how little those five PFDs amounted to, if she had assigned them to the commission, she would have satisfied her student loan debt. That is not disputed.

Second, Ms. J. does not dispute that she (not the commission) received her 2002 PFD. The reason why she received it is not material. Even if she subjectively believed that the executive director's silence in response to the request Ms. J. says she made, asking if she "could [have] her dividend back again," meant "yes" or "maybe" instead of "no" or "we did not get your letter," that belief does not change the fact that she did not assign the 2002 PFD to the commission.²⁴

²² AS 43.23.067(d).

²³ See *Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990) (explaining that the right to a hearing does not require development of facts in an evidentiary hearing when no factual dispute exists).

²⁴ The November 30, 2005 Response to Motion suggests that Ms. J. assumed from the fact that the 2002 PFD was deposited in her account after she wrote to the commission's executive director, asking if she could have her PFD back, the commission must have agreed to waive assignment of the PFD. She cites no legal theory to support the notion that the executive director's silence should be read as agreement to waive assignment of the 2002 PFD. Under the law, for a person to enforce such an agreement, the person has to show that the other party (in this case the executive director) made an actual promise, and also has to show that the person (in this case Ms. J.) took some action in reliance on that promise. See *Zeman v. Luftansa German Airlines*, 699 P.2d 1274, 1284 (Alaska 1985) (describing the test for promissory estoppel). Ms. J. has not asserted that the executive director promised to let her have her 2002 PFD, let alone that she took some action in reliance on such a promise.

Third, Ms. J. does not dispute that the 2002 PFD was one of the five PFDs within the scope of the agreement made in August 2000. Her August 13, 2000 letter offers each PFD “for the next five years” with the 2000 PFD counting “as year one.” The 2002 PFD would have been the third of the five. Even if she could support her position in the response to the motion that the five dividends should be counted beginning in 1998 (before the settlement agreement was reached), 2002 would still be one of the five years.

In short, Ms. J. does not dispute the material facts showing that she failed to assign one of the PFDs she agreed to assign. Instead, she urges that the settlement agreement be considered satisfied by assignment of the 2000, 2001, 2003 and 2004 PFDs. Thus, she has raised a question of law (not fact) about whether she satisfied the settlement agreement by making four rather than five PFD-assignment payments.

A party to an agreement such as the settlement Ms. J. and the commission reached must abide by the terms of the agreement, unless both parties mutually agree to change those terms.²⁵ After Ms. J. failed to assign the 2002 PFD, the commission offered to let her substitute direct payment of the \$1,540.76 amount, but she rejected that offer because she did not have the money to do so. As an alternative, the commission offered to amend the agreement to, in effect, replace the \$1,540.76 2002 PFD with the 2005 and 2006 PFDs. Ms. J. did not accept that offer either.

Instead, she made a counteroffer to “extend the agreement until such time as the balance of the 2002 dividend [\$1,540.76] has been paid.”²⁶ The commission did not accept that counteroffer.²⁷ But even if it had, or otherwise agreed to cap collection of additional debt at the \$1,540.76 amount of the 2002 PFD, the commission would be entitled to Ms. J.’s 2005 PFD. The 2005 PFD was \$845.76.²⁸ This is less than the \$1,540.76 Ms. J. admits was owed under the five-PFDs settlement agreement which, when in force, reduced her student loan debt significantly. Thus, the \$845.76 2005 PFD amount is far less than the full amount of Ms. J.’s remaining student loan debt. For these reasons, the commission is entitled to the full amount of Ms. J.’s 2005 PFD.

²⁵ *Zuelsdorf v. University of Alaska*, 794 P.2d 932, 935 (Alaska 1990) (explaining that one contracting party is not allowed to change the terms of an agreement, and thereby deprive the other party of the other party’s rights, without the consent of both).

²⁶ June 6, 2003 Letter from J. to Alaska Commission on Postsecondary Education.

²⁷ See June 19, 2003 Letter from Fishel to J. at p. 1 (responding with an offer to extend the PFD assignment arrangement to include 100 percent of the 2005 and 2006 PFDs and thus not agreeing to cap collection at \$1,540.76).

IV. Conclusion

The law allows the commission to claim Ms. J.'s PFDs to satisfy her defaulted student loan debt. That is true whether the debt is the full, accelerated loan amount or a reduced amount arrived at through settlement. At the very least, Ms. J.'s debt is \$1,540.76, which exceeds the 2005 PFD. If the five-PFDs settlement cannot be enforced, because Ms. J. did not follow through with assignment of the 2002 PFD, the debt could be a great deal larger. In that case, if Ms. J. does not reach a different compromise agreement with the commission, she could face repeated claims by the commission against her future PFDs to satisfy the full student loan debt. In any event, the commission's claim on Ms. J.'s entire \$845.76 2005 PFD is allowed by law and the commission staff's motion, therefore, is GRANTED.

DATED this 6th day of March, 2006.

By: Signed
Terry L. Thurbon
Chief Administrative Law Judge

Adoption

The undersigned, on behalf of the Alaska Commission on Post Secondary Education and in accordance with AS 44.64.060, adopts this Decision and Order 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 15th day of March, 2006.

By: Signed
Signature
Diane Barrans
Name
Executive Director
Title

[This document has been modified to conform to technical standards for publication.]

²⁸ See Attachment 1 (2005 Dividend Calculation and Overview of the 2005 Dividend Calculation print outs from the Permanent Fund Dividend division's webpage). Official notice is hereby taken of the fact that the 2005 PFD amount was \$845.76.