

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

In the Matter of)	
R. F.)	OAH No. 05-0807-PFE
_____)	Agency No. 5003297549

DECISION & ORDER

I. Introduction

R. F. submitted a Notice of Defense requesting a hearing on the Alaska Commission on Postsecondary Education’s claim against her 2005 permanent fund dividend (PFD).¹ The commission filed a Motion Requesting Summary Adjudication, arguing that Ms. F. had received notice of initial default on her student loans and that the commission “may garnish her 2005 dividend[.]”² Ms. F. neither participated in the prehearing conference nor responded to the commission’s Motion.

Because Ms. F. has failed to dispute the evidence submitted by the commission in support of its Motion, the commission’s Motion is granted.

II. Facts

On September 26, 2005, the commission received from Ms. F. a Notice of Defense requesting a hearing on the matter of the commission’s claim against her 2005 PFD.³ Ms. F. checked the box on the Notice of Defense form asserting that the commission had “not sent [Ms. F.] a Notice of Initial Default (notice that [her] loan[] is 180 or more days past due).”⁴ She provided no additional information on the basis for her appeal on the form.⁵

A prehearing conference was scheduled for November 14, 2005.⁶ Ms. F. was unable to participate in the November 14 prehearing conference, so it was rescheduled for November 18, and a message was left at Ms. F.’s phone number of record informing her of the change.

At the November 18, 2005, prehearing conference Julie Banfield, advocate for the commission staff, Diane Barrans, the commission’s Executive Director, and Stephanie Butler, a commission staff member, participated.⁷ Ms. F. was not available at her telephone number of

¹ October 4, 2005 Notice of Defense.

² November 28, 2005 Motion Requesting Summary Adjudication.

³ October 4, 2005 Notice of Defense.

⁴ *Id.*

⁵ *See id.* (showing that the “Additional information” lines were left blank).

⁶ November 1, 2005 Scheduling Notice.

⁷ November 21, 2005 Prehearing Order.

record, so the prehearing conference went forward without her participation.⁸ Because the commission staff anticipated filing a summary adjudication motion, deadlines were set for that motion and Ms. F.'s response, and scheduling of an evidentiary hearing was deferred pending determination of whether the appeal would be resolved based on the motion.

The commission filed a Motion Requesting Summary Adjudication.⁹ The Motion argued that Ms. F. received a letter of initial default on six occasions over five months.¹⁰ With the Motion the commission submitted a computer printout labeled "Notepad Facility" that has the name "F." on it and appears to illustrate financial activity.¹¹ Additionally, the commission submitted a form letter with no identifying names, addresses, or account information that contains the phrase: "THIS IS YOUR NOTICE OF INITIAL DEFAULT."¹²

Ms. F. did not respond to either the Prehearing Order, setting the deadline for her response to the Motion, or to the Motion itself.

III. Discussion

The commission is allowed to take a student loan borrower's PFD when the loan is in default.¹³ Once the commission has provided proper notification of its claim against a borrower's PFD, the borrower has the burden of refuting the commission's claim.¹⁴ The borrower may do this by showing one of only three things: (1) the commission did not send a notice of default in compliance with the law, (2) the notice of default has been rescinded, or (3) the amount owed by the individual is less than the amount claimed from the PFD.¹⁵ Ms. F.'s Notice of Defense claimed the first, that the commission did not send her a notice of initial default.¹⁶

Ms. F., therefore, initiated a hearing process by filing the Notice of Defense and assumed the burden of proving that the commission had not sent her the required notice of initial default. By filing a motion for summary adjudication, however, the commission undertook the burden of showing that no genuine issue of material fact exists as to whether it sent the required notice and that it is entitled, as a matter of law, to take Ms. F.'s 2005 PFD in (full or partial) satisfaction of

⁸ *Id.*

⁹ November 28, 2005 Motion Requesting Summary Adjudication.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* The date on the form letter shows that it was printed out contemporaneously with the preparation of the motion. This is consistent with the motion's characterization of the letter as a "sample" rather than a duplicate copy of any letter actually sent to Ms. F.

¹³ AS 14.43.145(a); AS 43.23.067.

¹⁴ AS 43.23.067(c).

¹⁵ *Id.*

her debt.¹⁷ This did not free Ms. F. from participating. To defeat a party's showing that no genuine issues of material fact exist, the other party has to respond to the motion. Typically, this means that the party must file an opposition to the motion and at least make some effort to refute the moving party's fact assertions or legal arguments.¹⁸

The commission's Motion argues that "there are no genuine issues as to any material facts," and it is supported by documentation.¹⁹ The commission's documentation, standing alone, without an affidavit describing how the commission's computer records are maintained, how the loan default letters are generated, and what some of the information in the documents means, would not in the face of an opposition compel the conclusion that no material facts are disputed. For example, the commission is required to notify an individual of a claim against that individual's PFD.²⁰ This notification must be sent to the address provided in the individual's PFD application and must provide the amount of the claim.²¹ Nothing in the documents accompanying the Motion, however, shows the actual address to which the sample form letter was sent or the figures that, in fact, were plugged into part of the sample letter that lists nines and punctuation as apparent place keepers for the loan number, due date and payment amount.

The commission staff's position in the Motion essentially is that the Notepad Facility computer printout and sample form letter, taken together, show that the notice of initial default requirements have been met. On its face, the printout does not show that it pertains to a student loan account for the R. F. who is a party to this action. It lists "F." as a "LAST NAME" and includes an "ACCT KEY" that resembles a social security number. To connect the printout to **R. F.**, however, it is necessary to deduce that the "ACCT KEY" is indeed a social security number and then compare it to the social security number listed in the "PFD NOTICE OF DEFENSE RECOMMENDATION" form provide as part of the initial case referral packet.

With that connection made, it is possible to deduce from the printout that Ms. F.'s "CUR PBAL" (presumably current principal balance) was \$7,600.35 at the time the printout was

¹⁶ October 4, 2005 Notice of Defense.

¹⁷ An administrative appeal can be decided on summary adjudication (i.e., without an evidentiary hearing) if no material facts are disputed. *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).

¹⁸ For instance, the opposing party may be required to generally deny the factual assertions. *See, e.g.*, 2 AAC 64.250(b) (requiring that the opposing party use affidavits or other evidence, not a mere denial, to refute the affidavit or other evidence submitted by the moving party).

¹⁹ *Id.*

²⁰ AS 43.23.067(b).

²¹ *Id.*

printed. When exactly it was printed is not clear. The latest date for which the printout contains an activity entry is September 1, 2005. Thus, more likely than not Ms. F. was indebted to the commission by more than the amount of the 2005 PFD²² when Ms. F. filed her Notice of Defense about a month later.²³ Additionally, Ms. F. did not assert in her Notice of Defense that the amount she owed is less than the amount claimed by the commission. In short, no fact dispute has been raised as to whether the commission's claim against Ms. F.'s 2005 PFD is based on an existing debt in excess of the PFD amount.

The dispute, if one indeed exists, is over whether the commission provided proper notice of the default. The statement in the Motion that Ms. F. "received" a letter of initial default²⁴ is unsupported; at most the documentary evidence shows that such a letter was sent. Proof of actual receipt of the default notice is not required; instead, the law allows a borrower to defeat the commission's claim against a PFD if the commission "has not sent a notice of default"²⁵ The Motion's imprecise legal argument and the limited, largely unexplained records²⁶ offered to support it would not have been sufficient but for Ms. F.'s failure to file an opposition.

Because Ms. F. did not file an opposition to the Motion, however, she has failed to express even a general denial of the commission's fact assertions. The documentation provided by the commission supports a conclusion that, more likely than not, the commission sent Ms. F. the required notice of initial default. The commission, therefore, is entitled to claim Ms. F.'s 2005 PFD.

IV. Conclusion

The law allows the commission to claim Ms. F.'s PFD to satisfy her defaulted student loan amount. The commission provided evidence that it followed the correct notification

²² The 2005 PFD amount was \$845.76. *See* Attachment 1, pp. 1 & 2.

²³ The record contains two copies of the Notice of Defense, both filed within four to five weeks after September 1. The first is stamped received by the commission on September 26, 2005, but was not signed by Ms. F. The second is stamped received on October 4, 2005, and shows a signature on that date.

²⁴ November 28, 2005 Motion Requesting Summary Adjudication.

²⁵ AS 43.23.067(c)(1).

²⁶ Business records frequently can stand on their own to provide good evidence of material facts. When the records require explanation, however, the better course is to provide affidavit (or live) testimony to explain the records and provide any necessary foundation. If this is not done, the party relying on the records may discover that the evidence is insufficient to support the argument.

procedures for claiming Ms. F.'s PFD, and filed a Motion Requesting Summary Adjudication on the matter. Because the commission's Motion is unopposed, the Motion is GRANTED.

DATED this 21st day of June, 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 25th day of July, 2006.

By: Signed
Signature
Diane Barrans
Name
Executive Director
Title

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