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

IN THE MATTER OF	)	
	)	
S. B.	)	Case No. OAH-09-0592-PFE
	)	ACPE Case No. 7615231652

DECISION

I. Introduction

The appellant, S. B., appeals a claim on her permanent fund dividend (PFD) by the Alaska Commission on Postsecondary Education ("the commission"). Administrative Law Judge Dale Whitney heard the appeal on January 10, 2010. Ms. B. appeared by telephone. Stephanie Butler represented the ACPE by telephone.

The evidence shows it to be more likely than not that the commission has substantially complied with the requirement to send Ms. B. notice of default as required by AS 14.43.145(c). The commission is therefore entitled to take Ms. B.'s PFD and apply it to the balance of her loans.

II. Facts

This case comes with a long history. Ms. B. received three student loans in 1988 in the amounts of $3,200.00, $950.00, and $5,500.00, a total of $9,650.00.[1] These loans were disbursed for attendance at an institution called Victorian Academy to study cosmetology.[2] In 1988, Ms. B. was seventeen years old and having her first child.[3]

In 1995 the commission took Ms. B.'s 1995 dividend in a case similar to this one.[4] Ms. B. appealed that decision and testified at a hearing. Ms. B. argued in that case that her signatures had been forged by the institution she had attended and that she had no knowledge of the loans, and that the proceeds had been fraudulently taken by the director of the institution. The commission acknowledged some irregularities on the part of the institution Ms. B. had attended, including certain instances in which the institution had forged Ms. B.'s signature. However, the commission determined that Ms. B. had knowingly signed the promissory notes, that the funds had been properly disbursed to the institution for Ms.

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[1] Exhibits A, B and C are copies of the single-page promissory note for each of the three loans. While there are a number of documents in the record, nothing else has been marked with an exhibit name or number. Other documents are therefore identified by the names of the documents.

[2] Testimony of Ms. B.

[3] Testimony of Ms. B.; decision in case number 1995-170.

B.'s benefit, and that Ms. B. had received at least $2,310 of the loan proceeds in cash. The commission determined that Ms. B. was legally obligated to repay the loans and that it had statutory authority to claim her 1995 permanent fund dividend.

The commission found in the previous case that Ms. B. did complete some courses at the institution, but that she ultimately dropped the program. Shortly after that the school closed. Two weeks before she dropped out, Ms. B. received $2,310 in cash for living expenses. Ms. B.'s testified again at the hearing in this case that she never received any of the disbursed funds, and that she never received any educational benefit from the loans. Ms. B. also testified that she never received any notice of default from the commission.

On January 11, 1991, the commission sent Ms. B. a notice for each of the three loans stating that the accounts were more than 90 days past due.[5] The notices stated that if the loans became more than 120 days past due, they would be in default and would be transferred to a collection agency. These notices explained that when the loans went into default and were transferred to a collection agent, the entire amount owing would be declared immediately due, the interest rate would rise to ten percent, additional fees and collection costs would also be due, and the borrower would be ineligible for additional loans from the commission. These notices did not state that the commission could take the borrower's permanent fund dividend upon default. The notices were mailed by certified mail and Ms. B. signed for them, using her previous name of Susanne Crockett.[6] Ms. B.'s signature on the certified mail receipt cards is similar to her current signature on the appeal form.

On May 8, 1991, a credit agency sent Ms. B. a letter for each loan headlined "**DEFAULT!**"[7] The letters stated that "your defaulted Alaska Student Loan has been assigned to this agency for collection by the Alaska Commission on Postsecondary Education." The letters explained a 30-day cure period, and stated that if the default was not cured the credit agency would obtain a judgment and add attorney, filing, and process serving fees. These letters did not state that the credit agency or the commission could take permanent fund dividends.

As of September 8, 2009, Ms. B. owed a total of $9,184.48 in principal and accrued interest of $8,384.41.[8]

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[4] Decision in Case no. 1995-170.
[5] Post hearing submission from the commission.
[6] *Id.*
[7] *Id.*
[8] Affidavit of Faith Guthert, October 30, 2009.

III. Discussion

On her appeal form, Ms. B. checked a box indicating that "ACPE has not sent a Notice of Initial Default (notice that my loan (s) is 180 days or more past due) to my address of record at the time of default, as required by Alaska Statute 14.35.145(b)." In a space for additional information, Ms. B. wrote,

> This account is 20 years old. I was under age at the time and the owner of Victorian Academy – Cheryl Hughes, forged my signature to take out student loans on all the students. It was proven 20 years ago when an Investigator was sent out by you. Also, I did not have a parental consent nor did I ever receive training for anything. (underlines in original)

The issues that Ms. B. raised on the space for additional information were all raised and discussed in the previous decision, and decided in favor of the commission's right to claim Ms. B.'s permanent fund dividends. Although the previous decision did find that "the account was declared in default on February 7, 1991" the commission points out that the issue of whether the commission had sent proper notice of the default in accordance with AS 14.35.145(b) was not raised or directly litigated in the previous case, and that Ms. B. is entitled to a decision on that issue.

When the commission takes the PFD of a borrower who is in default, the commission 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 has not sent a notice of default in compliance with AS 14.43.145(b):
2. the notice of default was rescinded in the process described above; or
3. "the amount owed by the borrower is less than the amount claimed from the permanent fund dividend."[9]

At a hearing, the borrower has the burden of proving one of these three elements.[10] Thus, the only issue to be considered in this case is whether the commission sent Ms. B. the proper notice of default.

Review of Ms. B.'s case is somewhat complicated by the fact that AS 14.43.145 was not enacted until 1997, well after the time Ms. B. defaulted on her loans. Ms. B. was sent appropriate notices of default under former 20 AAC 15.065, which at the time of her loans and default set the time for default at 120 days, and required notice of the impending default to be sent when the loan was 90 days delinquent. The notice generally explained the

[9] AS 43.23.067(c).

effect of default, but it did not specifically state that future permanent fund dividends would be taken.

There is a theoretical argument to be made that Ms. B. did not receive the proper notice of default under AS 14.43.145(b) because, even though Ms. Banfield was sent all the proper notices under the existing laws at the time, the notices did not specifically state that defaulting on the loans would result in the taking of Ms. B.'s future permanent fund dividends. Under this line of reasoning, one could posit that had Ms. B. known that the commission might take her future dividends in addition to accelerating the full balance of the loans, obtaining judgments, referring the matter to collections agents, increasing the interest rate and adding additional fees and costs, Ms. B. might have taken additional steps to contest the default or to cure the delinquency.

Although Ms. B. was not sent notice of her default under AS 14.43.145(b) because that statute had not been enacted at the time of her default, Ms. B. was sent proper notice under that statute's predecessor, 20 AAC 15.065. Ms. B. also had adequate notice that her Permanent Fund Dividends would be claimed by the commission. Under the headline "DEFAULT," the promissory notes themselves state that "I understand that failure to make a payment within 120 days of when it is due shall mean my loan is in default, interest shall automatically be raised to ten (10) percent, and my Alaska Permanent Fund Dividend, if applicable, may be attached." Ms. B. was certainly on notice since 1995 that her dividend would be taken due to her default, as the commission actually took her dividend that year, provided proper notices, and went through the entire appeal process for taking of a dividend. At that time, Ms. B. did not protest that the commission had failed to send her proper notice of default at the time of default.

IV. Conclusion

The commission sent Ms. B. proper notices of default as required by the laws in effect at the time the loans were made and at the time of default. Ms. B. had actual notice

[10] *Id.*

that her loans were in default, and that default may result in the taking of permanent fund dividends. The commission is entitled to maintain a claim on Ms. B.'s permanent fund dividend.

DATED this 29th day of March, 2010.

By: *Signed*
DALE WHITNEY
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 3rd day of May, 2010.

By: *Signed*
Signature
Diane Barrans
Name
Executive Director
Title

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