

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

In the Matter of the)
)
 E B)
_____)

OAH No. 13-1265-PFE
Agency No. 5039271544

DECISION

I. Introduction

The Alaska Commission on Postsecondary Education (ACPE) claimed E B's 2013 permanent fund dividend (PFD). Mr. B appealed by submitting a Notice of Defense.

A hearing was held on November 19, 2013. Mr. B testified on his own behalf. Faith Guthert testified for the ACPE staff, and served as staff's lay representative in this matter. After the hearing, the record was left open to allow both parties an opportunity to submit additional records. The ACPE staff submitted additional exhibits; Mr. B did not. ACPE's action taking Mr. B's PFD is reversed because his loan was not in default when the Notice of Default was sent.

II. Facts

Mr. B applied for and received a consolidated loan under the AlaskaAdvantage student loan program.¹ Mr. B signed as the borrower on April 7, 2003,² and the total amount due as of May 5, 2003, when the loan was approved, was \$19,139.59.³

As of February 19, 2013, Mr. B was 180 days past due on his AlaskaAdvantage loan.⁴ On that date, he was sent form SB 7, which is a letter titled "Notice of Default."⁵ He made a minimum payment on February 27, 2013, but fell behind in his payments and was sent a second Notice of Default on April 22, 2013.⁶ Mr. B made another minimum payment on April 26, 2013, but fell behind once more, and was sent a third Notice of Default on June 20, 2013.⁷

At various times during the summer of 2013, Mr. B contacted ACPE and attempted to work out a payment plan and avoid having his loan sent to collection.⁸ At one point he asked

¹ Exhibit A.
² Exhibit A 2.
³ Exhibit A 2.
⁴ Testimony of Ms. Guthert.
⁵ *Id.*
⁶ Supplemental letter from ACPE Staff dated November 26, 2013.
⁷ *Id.*
⁸ Testimony of Mr. B.

about deferring payments. ACPE sent him a form to request deferment, and he completed and returned that form on June 29, 2013.⁹ The form he was sent only applied to a different loan—his federal student loan—and the request was denied because he did not yet owe any payments on his federal loan.¹⁰ However, the letter dated August 2, 2013, denying the deferment, states that his request to defer payments was denied because his “education loan account has not entered repayment.”

Mr. B testified that he understood The August 2nd letter to mean his student loan account was not in default. Ms. Guthert explained that this letter only referred to Mr. B’s federal student loan, and not to any other loans in his account.¹¹ She further explained that Mr. B was notified that this only applied to one of his loans because the initials “WS” in the reference line of the letter indicate that the letter only refers to his federal Stafford Loan. The deferment denial letter would have the initials “CL” at the top of the letter if it referred to Mr. B’s consolidated state loan.¹²

III. Discussion

ACPE is allowed to take a borrower’s PFD when the loan is in default.¹³ Once it has provided proper notification of its claim against a PFD, the borrower has the burden of refuting ACPE’s claim.¹⁴ The borrower may do this by showing one of only three things: (1) ACPE did not send a notice of default in compliance with AS 14.43.145(b), (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 Mr. B indicated in his Notice of Defense that he was contesting ACPE’s action based on the first reason: that a notice of default had not been sent in compliance with the law.

Alaska Statute 14.43.145(b) states:

The commission shall notify the borrower of the default, and the consequences of default imposed under (a) of this section, by mailing a notice to the borrower’s most recent address provided to the commission by the borrower or obtained by the commission.

According to this statute, a default under subsection (a) occurs

⁹ Testimony of Mr. B, form attached to hearing referral.

¹⁰ Testimony of Ms. Guthert; August 2, 2013 letter from ACPE.

¹¹ Testimony of Ms. Guthert. She testified that he had one Education Loan Account containing at least two student loans.

¹² Testimony of Ms. Guthert.

¹³ AS 14.43.145(a); AS 43.23.067.

¹⁴ AS 43.23.067(c).

¹⁵ *Id.*

after a loan payment has become 180 or more days past due or, for a loan under AS 14.43.161 – 14.43.168 or 14.43.170 – 14.43.175, the default requirements established by the commission have been met.^{16]}

Mr. B's loan is a 2003 AlaskaAdvantage loan.¹⁷ The AlaskaAdvantage loan program is governed by AS 14.43.161 – 168. By ACPE regulation, an AlaskaAdvantage loan is considered to be in default based on the definition of default in federal regulations.¹⁸ Under the applicable federal regulation, the loan is in default if a payment is 270 or more days past due.¹⁹ Thus, the default requirement established by the commission is that the loan be 270 days past due. This period is consistent with the loan document itself, which states the loan is in default if a required payment is not made within 270 days of its due date.²⁰ ACPE's records show that at the time each of the three Notices of Default were sent, Mr. B's loan was less than 270 days past due.²¹ Therefore, the loan was not in default.

ACPE staff argued that Mr. B's loan agreement specifically allowed it to take his PFD after 180 days. The loan document does say that his loan may be considered "seriously delinquent" if it is 180 days past due, and that ACPE may *garnish* a PFD to prevent a delinquent loan from being in default.²² While ACPE may have been permitted to garnish Mr. B's PFD to prevent a default, the rules applicable to garnishment are different from the rules set out in AS 43.23.067 for claiming a PFD after the loan is in default.²³

Alaska Statute 14.43.145 sets out the requirements for taking a borrower's PFD. One of the primary requirements under this statute is that the loan actually be in default. The notices sent to Mr. B were not in compliance with AS 14.43.145(b) because there was no default under section 145(a) when the notices were sent.²⁴

¹⁶ AS 41.43.145(a) (emphasis added).

¹⁷ Exhibit A-1.

¹⁸ 20 AAC 15.165.

¹⁹ 34 C.F.R. § 682.200(b).

²⁰ Exhibit A 2.

²¹ Exhibit D1. This printout shows the maximum days past due to be 203 days on July 12, 2013. Assuming no efforts to bring his account up to date since after July 12, his loan would have entered default status on September 17, 2013.

²² *Id.*

²³ For example, 20 percent of a PFD is exempt from garnishment. AS 43.23.065(a). The 20% exemption does not apply to a student loan after it is in default. AS 43.23.065(b)(3).

²⁴ Because the notices were sent prematurely, it is not necessary to consider whether the August 2nd letter telling Mr. B his loan account had not entered repayment would estop ACPE from taking his PFD.

IV. Conclusion

Mr. B contested ACPE's action and claimed that it had not mailed a Notice of Default that complied with AS 14.43.145(b). Mr. B was correct. ACPE's action to take Mr. B's PFD is reversed without prejudice. ACPE may renew its efforts to take future PFDs at any time his payments are more than 270 days past due.

DATED this 5th day of December, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

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OAH No. 13-1265-PFE
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ADOPTION OF REVISED DECISION

The undersigned, by delegation from the Alaska Commission on Postsecondary Education (ACPE) and in accordance with AS 44.64.060(e), revises the administrative law judge’s proposed decision as discussed below.

The discussion in **Section III of the proposed decision is not adopted** because it addresses an issue that could only have been raised during an appeal of the Notice of Default, and not during an appeal of the decision to take Mr. B’s PFD. The following language is adopted in its place:

ACPE is allowed to take a borrower’s PFD when the loan is in default.²⁵ Once it has provided proper notification of its claim against a PFD, the borrower has the burden of refuting ACPE’s claim.²⁶ The borrower may do this by showing one of only three things: (1) ACPE did not send a Notice of Default in compliance with AS 14.43.145(b), (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.²⁷ Mr. B indicated in his Notice of Defense that he was contesting ACPE’s action based on the first reason: that a notice of default had not been sent.

Alaska Statute 14.43.145(b) states:

The commission shall notify the borrower of the default, and the consequences of default imposed under (a) of this section, by mailing a notice to the borrower’s most recent address provided to the commission by the borrower or obtained by the commission.

Mr. B asserted that ACPE had not sent a Notice of Default to his address of record. However, as noted in the findings of fact above, a Notice of Default was sent to him. This finding is consistent with the testimony of ACPE’s witnesses and ACPE’s business records entered into the record. Mr. B also acknowledged in his testimony that he had received

²⁵ AS 14.43.145(a); AS 43.23.067.

²⁶ AS 43.23.067(c).

²⁷ *Id.*

other documents sent to him by ACPE, which indicates ACPE was using his correct address, but did not recall receiving the Notice of Default. Mr. B did not meet his burden of proving that the Notice of Default had not been sent to him.²⁸

Because he did not meet his burden of proof, ACPE may take Mr. B's PFD. Accordingly, **the conclusion in Section IV of the proposed decision is also not adopted** and instead the decision to take Mr. B's PFD is **AFFIRMED**.

DATED this 16th day of January, 2014.

By: Signed _____
Name: Diane Barrans
Title: Executive Director

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.

²⁸ To the extent there is an argument that the Notice of Default was deficient in some way, that issue should have been raised earlier in an appeal to the executive director pursuant to AS 14.43.145(c). *See In re T Q G*, OAH No. 13-1264-PFE (ACPE 2013).