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

In the Matter of	)	
	)	
M K. X	)	OAH No. 14-1655-PFE
	)	Agency No. 7802063844

DECISION

I. INTRODUCTION

The Alaska Commission on Postsecondary Education (ACPE) claimed M X's 2014 Permanent Fund Dividend (PFD). Mr. X appealed by submitting a Notice of Defense. A case planning conference was scheduled for November 4, 2014, and the hearing followed, by agreement, on December 10, 2014.

At the time of the planning conference, the ACPE staff had recently served a motion for summary adjudication, and the time for response to the motion had not yet passed. Mr. X submitted a written response prior to the hearing. At the start of the hearing, the motion was denied, based on factual disputes raised by Mr. X in his comments during the planning conference and in his filed response.

At the hearing, Mr. X presented testimony on his own behalf. The staff provided information by affidavit, letter, and testimony through its Financial Aid Supervisor, Faith Guthert.

The law provides an extremely limited set of defenses that can be considered in a PFD execution hearing, and the borrower has the burden to establish one of those defenses.[1] Mr. X established one of those defenses, and his appeal must be sustained.

II. FACTS

In 2007, Mr. X executed a promissory note for a state student loan,[2] which was subsequently disbursed to him in principal amounts totaling $17,000.[3] He apparently defaulted on that loan.[4] The amount of the accelerated unpaid balance (including interest) is currently more than $24,000,[5] and it therefore exceeds the amount of the 2014 PFD.

---

1 AS 43.23.067(c).

2 Ex. A.

3 Guthert Affidavit, ¶ 3.

4 At the hearing, Mr. X disputed ACPE's allegations concerning the default. Whether or not the loan was properly placed in default status, however, is not within the purview of this hearing.

5 Guthert Affidavit, ¶ 6.

When he originally took out the loan, Mr. X gave as his address [TX Address].[6] According to ACPE records, on August 20, 2007, Mr. X telephoned ACPE and stated that the Texas address was permanent, and that he was on his way to Anchorage (where he would attend No Name University) and would be updating his address.[7] ACPE records indicate that he submitted no further changes of address through September of 2014.[8] Mr. X stated in his response to ACPE's motion for summary adjudication, however, that he kept his address up to date with the No Name University financial aid office, and that he believed that was all he needed to do.[9]

ACPE records indicate that in April, 2010, the U.S. postal service sent ACPE an "address update" indicating that Mr. X's address had changed to [AL Address]. From that time until mid-September 2014, ACPE considered this to be Mr. X's "address of record" for purposes of its communications with him. Mr. X, however, has never resided at that address or used it for <u>any</u> purpose.[10] It happens to be his uncle's address. Mr. X testified credibly that the only connection he has ever had with that address occurred when he applied for a private student loan with No Name Bank, and his uncle signed the loan application as a co-signer, using the [AL Address].[11] Mr. X never provided the [AL Address] to ACPE for purposes of communicating with him regarding his loan.

ACPE, for reasons that are not entirely clear on this record, took Mr. X out of deferment status in December 2013.[12] At that time, unbeknownst to him, he was required to start making payments on the loan. According to ACPE's standard practices, it would have sent Mr. X monthly billing statements starting on January 1, 2014, as well as letters when the loan was 30, 60, 90, 120 and 150 days delinquent, all of which would have been sent to the [AL Address].[13] ACPE subsequently deemed his loan to be 180 days past due on June 3, 2014, at which time his loan was considered to be in default; and a letter to that effect constituting official notice of the

---

6 Ex. A.
7 Guthert letter of Nov. 12, 2014.
8 *Id.*
9 X testimony.
10 *Id.*
11 *Id.*
12 ACPE's September 29, 2014 letter denying Mr. X's appeal of the default stated that this occurred because the university reported him as having "withdrawn" for the fall 2013 semester. At the hearing, however, ACPE's representative stated that it may have been because Mr. X was not carrying a sufficient number of units.
13 Guthert affidavit and testimony.

default (a so-called "180-day letter") was sent to Mr. X at the [AL Address] on June 4, 2014.[14] On September 3, 2014, ACPE sent Mr. X a "270-day letter," also to the [AL Address].[15] His uncle contacted him at that point and forwarded the 270-day letter to him via email on September 10, 2014.[16] This was the first time Mr. X learned that his loan was delinquent or in default.[17]

ACPE transferred Mr. X's loan account to Premier Credit of North America, a collection agency, on or about September 16, 2014, due to it being in "180 days past due" status.[18] Almost immediately, Premier Credit independently determined Mr. X's current, correct Anchorage address and corresponded with him there.

Mr. X appealed the determination by ACPE that his loan was in default on or about September 16, 2014.[19] In a letter dated September 29, 2014, ACPE denied his request for a hearing on his appeal, in part because his appeal had not been timely filed, i.e., within 30 days of the date of the notice of default.[20]

III. DISCUSSION

ACPE is allowed to take a student loan borrower's PFD when the loan is in default.[21] Once ACPE has provided proper notification of its claim against a borrower's PFD, the borrower has the burden of refuting the commission's claim.[22] The borrower may do this by showing one of only three things: (1) ACPE 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.[23] Mr. X's appeal form submitted in this matter indicated 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 is the relevant statute that ACPE must comply with in issuing notices of default. It states, in pertinent part:

---

14 *Id.*
15 *Id.*
16 X testimony.
17 *Id.*
18 Guthert testimony and affidavit.
19 Ex. E.
20 *Id.* Although the default determination is not within the purview of this hearing, it is noted that the factual basis for the default cited in the September 29, 2014 denial letter does not entirely correspond with the facts cited during this hearing. *See* footnote 12 above.
21 AS 14.43.145(a)(2); AS 43.23.067.
22 AS 43.23.067(c).
23 *Id.*

> 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**.[24]

ACPE's notice was sent to the Alabama address that Mr. X had not provided to ACPE in connection with this loan and that was not, and had never been, his address.

Mr. X admits that he received the letter sent by ACPE in September, 2014, but this was only after the loan had been deemed 270 days delinquent and in default. In any event, the applicable statute in this case does not make actual receipt or non-receipt of the notice of default a relevant issue. The sole question is whether the notice was *mailed* to (i) the address the borrower gave to ACPE or (ii) to an "address … obtained by the commission." There is no dispute that it was not mailed to the first type of address. As to the second, it is surely implicit in the statute that "address" means either an address of the borrower or one reasonably calculated to result in the notice being delivered to the borrower. If this were not so, ACPE could simply mail notices to randomly obtained addresses, which would be an absurd construction of the statute.[25]

Mr. X testified emphatically, and credibly, that he has never used the [AL Address] or resided there, so one cannot conclude that this was an address of the borrower. Nor can one conclude that it was an address reasonably calculated to result in the notice of default being delivered to the borrower. In this case, ACPE's representative testified that the commission sent numerous letters and notices to Mr. X at the [AL Address]. Yet Mr. X testified that, for unknown reasons, his uncle received none of those letters and notices until the 270-day letter in September 2014. The [AL Address], therefore, was nearly equivalent to a randomly selected address, for purposes of communicating with Mr. X.

It bears noting that ACPE can, of course, mail the required notice to more than one address. Thus, the notice to Mr. X could have been sent to the last address he provided, along with any other address the commission might surmise was his more recent location. Had that been done in this case, the notice of default would have been in compliance with the law. Importantly, had that been done, Mr. X would have received timely notice of the default status of his loan and would have been able to file a timely appeal of the default determination.

---

[24] AS 14.43.145(b) (emphasis added).

[25] Courts will not construe statutory language in a way that would produce absurd results. *See, e.g., Rector v. Holy Trinity Church,* 143 U.S. 457, 461 (1892).

IV. CONCLUSION

The law allows ACPE to claim Mr. X's PFD only if it follows a simple but precisely defined notification procedure. Mr. X has met his burden of establishing that ACPE did not follow the proper notification procedure regarding the default status of his loan. ACPE, therefore, is not entitled to maintain a claim on Mr. X's 2014 PFD. ACPE's action to claim his PFD is reversed.

DATED this 18th day of March, 2015.

Signed
Andrew Lebo
Administrative Law Judge

Non-Adoption Options

D. The undersigned, on behalf of the Alaska Commission on Post Secondary Education and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

After applying the law to the facts in this case, the administrative law judge (ALJ) ultimately determined that "Mr. X has met his burden of establishing that ACPE did not follow the proper notification procedure regarding the default status of his loan."[26] For the reasons set forth below, the undersigned, on behalf of the Alaska Commission on Postsecondary Education (ACPE), hereby rejects the ALJ's application of AS 14.43.145(b) to the facts of this case, and upholds ACPE's claim to Mr. X's permanent fund dividend.

In a recent final administrative decision of ACPE, the exact issue presented here was considered and resolved in favor of ACPE. In *In The Matter of: X H. S,* ACPE had utilized a forwarding address it had obtained from the United States Postal Service (USPS) when the USPS

[26] *In the Matter of: M K. X*, OAH No. 14-1655-PFE (Proposed Decision), pg. 5.

"sent the address to the [ACPE] as a forwarding address for Mr. S."[27] Similar to the case here, ACPE in *S* relied on the address provided to it by the USPS.[28]

In regards to assessing the reasonableness of the notice provided, the ALJ in *S* established a "reasonableness" test[29] similar to the test set forth in the proposed decision in *X*.[30] However, unlike the ALJ in the instant case, ACPE in S ultimately determined that it gave "reasonable notice and acted reasonably in addressing that notice."[31]

In this case, ACPE concludes that it similarly provided "reasonable notice and acted reasonably in addressing that notice." As in *S*, ACPE reasonably relied on an official "address update" from the USPS. To be clear, ACPE never "received returned mail from this address to indicate the address was incorrect."[32] Given ACPE's exclusive reliance on a USPS address change was deemed sufficiently reasonable in providing notice in *S* under vastly similar circumstances, ACPE's reliance on official USPS notification here likewise reveals the

[27] OAH No. 14-1697-PFE, pgs. 1-2 (December 23, 2014). In accordance with AS 44.64.060(e)(1), the ACPE ultimately adopted the ALJ's proposed decision and Order as the final administrative determination in this case.
[28] *Id.* at 2.
[29] "Given that [AS 14.43.145(b)] does not specify any measures that the [ACPE] should take to verify an address that it obtains, the only requirements is that the [ACPE] act reasonably in obtaining an address – a requirement frequently inferred in law. Therefore, Mr. S can prevail only if he proves that the [ACPE] acted unreasonably." *S*, OAH No. 14-1697-PFE, pg. 3. The rule set forth in *S* is consistent with the rule established by the U.S. States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950). The rule established in *Mullane* states that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314-15. To be clear, notice is deemed constitutionally adequate when "the practicalities and peculiarities of the case . . . are reasonably met." *Id.*
[30] "[I]t is surely implicit in the statute that 'address' means either an address of the borrower *or one reasonably calculated to result in the notice being delivered to the borrower*." *X*, OAH No. 14-1655-PFE (Proposed Decision), pg. 4 (emphasis added).
[31] *S*, OAH No. 14-1697-PFE, pg. 3.
[32] *Motion for Reconsideration*, pg. 3 (April 10, 2015); *Guthert testimony*.

reasonableness of ACPE's notification efforts.[33] ACPE's reliance on the USPS forwarding address notification was reasonable and it was under no obligation to second-guess the forwarding address information it was provided by the USPS. And under all of the circumstances, ACPE's notice was reasonably calculated to apprise Mr. X of the pendency of the action and afford him an opportunity to present his objections.[34] Accordingly, ACPE's notice was in full compliance with AS 14.43.145(b).[35]

As a final matter, 20 AAC 15.540 imposes certain duties on education loan borrowers like Mr. X, including the duty to report in writing to ACPE "any change of the student recipient's . . . address . . ." Mr. X failed to do so.[36] Mr. X needed only to inform ACPE in writing to ensure he received the notice at issue. The fact that Mr. X chose not to avail himself of this method of protecting his interest is certainly telling.

The Alaska Commission on Postsecondary Education's claim on Mr. X's 2014 permanent fund dividend is affirmed. In all other material respects, except where inconsistent with this Decision, the March 18, 2015, Proposed Decision is adopted.

[33] For these reasons, the Commission specifically rejects the interpretation that "[t]he [AL address], therefore, was nearly equivalent to a randomly selected address, for purposes of communicating with Mr. X." *X*, OAH No. 14-1655-PFE (Proposed Decision), pg. 4.
[34] *See Mullane*, 339 U.S. at 314-15.
[35] ACPE also specifically rejects the interpretation that had it simply provided notification to the last address Mr. X provided along with notification to the Alabama address, "the notice of default would have been in compliance with the law." *X*, OAH No. 14-1655-PFE (Proposed Decision), pg. 4. The "address of record" for Mr. X yielded an infirm address as evidenced by the USPS notification. *See Guthert testimony*. Relying on an address – even a last provided address – that is found to be infirm may not be reasonable in terms of providing proper notice. *See Jones v. Flowers*, 547 U.S. 220, 225 (2006) ("We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so").
[36] *Guthert testimony.*

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 30th day of April, 2015.

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

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