IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

GERALD EDWARDS Appellant,	)	
v.	)	
STATE OF ALASKA, DEPARTMENT OF REVENUE CHILD SUPPORT SERVICES DIVISION Appellee.	)	Case No. 3AN-11-5401CI

Order on Administrative Appeal

Appellant, Gerald Edwards, appeals the April 27, 2000[1] child support order issued by an Administrative Hearing Officer within the Child Support Services Division (CSSD) of the State of Alaska Department of Revenue (Appellee) and upheld by the November 19, 2010 decision of an Administrative Law Judge (ALJ) within the Office of Administrative Hearings and approved by the Commissioner on December 28, 2010. The Court finds that the April 27, 2000 child support order is VOID due to lack of notice on Appellant of the February 9, 2000 hearing. The Court finds that Appellant is entitled to a formal administrative hearing under AS 25.27.170 and REMANDS back to the agency for a hearing in front of an Administrative Hearing Officer.

[1] Exhibit 42-46. (A child support decision was issued on March 29, 2000 but was corrected on April 27, 2000 because the interest was improperly calculated.)

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STATUTORY BACKGROUND

The statutes governing the ability of CSSD to establish child support for a falls under AS 25.27.160.[2] Before initiating a child support order, the agency sends a request for financial information to the parents.[3] After receipt of this information, or after the expiration of the period, the agency determines the child support amount. [4] The child support amount is determined using a percentage of the parent's adjusted annual income as outlined in Civil Rule 90.3.[5] If CSSD has determined that the parent is voluntarily underemployed or unemployed, they can base support on an estimate of the parent's potential income.[6] Additionally, if CSSD has no income information, they can estimate income using a default amount based on average income for persons with that parent's skills.[7]

Once the child support amount is determined, the agency serves[8] the Notice and Finding of Financial Responsibly (NFFR) on the non-custodial parent.[9] This notice tells the obligor that they may appear and show cause in a hearing why the finding is incorrect or should be modified.[10]

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[2] AS 25.27.160.
[3] 15 AAC 125.100.
[4] 15 AAC 125.100(b).
[5] 15 AAC 125.010. *See* Civil Rule 90.3(a). The adjusted income takes into account income from all sources. *See* 15 AAC 125.020; 15AAC 125.030; 15 AAC 125.050.
[6] 15 AAC 125.060.
[7] 15 AAC 125.050(d).
[8] Service of notice falls under Civil Rule 5. *See* AS 25.27.265.
[9] 15 AAC 125.100(b).
[10] AS 25.27.160(a-b).

The parent may also request an administrative review of the NFFR within thirty days of the receipt to prove that the amount is incorrect.[11] If the review officer believes that an adjustment is necessary, it will direct the agency to adjust the NFFR.[12] If the review officer does not believe that an adjustment is necessary, the NFFR by the agency will stand.

The parent is entitled to formal hearing before a hearing officer if requested within 30 days of the date of service of the final NFFR.[13] This hearing officer shall consider the needs of the obligee, the amount of the obligor's liability, the intent of the legislature that children be supported as much as possible by their natural parents, and the ability of the obligor to pay.[14] If the person requesting the hearing fails to appear, then the hearing officer shall enter a decision in the amount stated in the NFFR.[15] If no hearing is requested, the obligor's property and income may be subject to execution under AS 25.27.062 and 25.27.270.[16]

The statute allows CSSD to vacate an administrative support order issued by the agency under AS 25.27.160 at any time if the order was based on a default amount.[17] A default order is defined in the regulations as based on "average annual wage income by age group statistics or other group wage statistics provided by the Department of Labor and Workforce development."[18]

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[11] 15 AAC 125.118.
[12] 15 AAC 125.118(e).
[13] AS 25.27.170.
[14] AS 25.27.170(e).
[15] AS 25.27.170(f).
[16] AS 25.27.160(b)(4).
[17] AS 25.27.195(b).
[18] 15 AAC 125.121(j).

[redacted]

FACTS AND PROCEDURAL HISTORY[19]

Appellant has two children with Ms. Corso. In January 1999, Ms. Corso applied for CSSD services, and in March 1999, CSSD issued a NFFR requiring Appellant to pay monthly child support for the first child.[20] Appellant was served with the NFFR while he was incarcerated at Cook Inlet Pretrial Facility in Anchorage.[21] The monthly support was based on the average annual income for Alaska because Mr. Edwards did not provide income information to CSSD.[22]

Appellant requested an administrative review, and provided a mailing address within Anchorage.[23] CSSD undertook an administrative review[24] and Appellant dropped off documents attempting to prove that he was living with Mrs. Corso and that his income was incorrect.[25] CSSD determined a new child support figure using the Alaska Department of Labor hourly wage for an auto mechanic based on a resume of Appellant[26] and his business license. This decision was mailed to Mr. Edwards at his Anchorage address on December 10, 1999.[27]

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[19] This case has a long history dating back to 1999. The Court reproduces only the relevant facts here.
[20] Exhibit 3-4. (Unless otherwise noted, the Court refers to Exhibits submitted with the briefs, not the entire agency record.)
[21] Exhibit 5.
[22] Exhibit 3.
[23] Exhibit 6.
[24] CSSD scheduled an Administrative Review on November 1, 1999 and served the notice to Appellant at Cook Inlet not the mailing address he provided. *See* Exhibit 6. Eventually Appellant became aware of the administrative review, and was told he had until November 15, 1999 to submit documents to CSSD. Appellant dropped off documents at the CSSD office on November 10, 1999. For more detail, see Brief of Appellant at 5, filed October 11, 2011.
[25] Brief of Appellant at 5.
[26] *Id.* Appellant argues these were created by M. Corso. The Court finds that is not relevant to this appeal.
[27] Exhibit 14.

[redacted]

Based on this decision, Appellant requested a formal hearing and listed his mailing address within Anchorage.[28] He also listed a New Jersey physical address, where he was staying with Ms. Corso.[29] On January 24, 2000, Appellant called and inquired about the status of the hearing, and was told a date had not yet been set.[30] On January 26, 2000 a notice of the hearing was mailed to both and Ms. Corso at the New Jersey address.[31] Neither party was present for at the February 9, 2000 appeal hearing.[32] The hearing officer issued a corrected child support decision on April 27, 2000 and found that Appellant had received notice of the hearing.[33] This decision was mailed to Appellant to New Jersey address, but the decision was returned to CSSD marked "Unclaimed".[34]

In October 2000, Ms. Corso filed an application for modification of the administrative support order to add the second child.[35] Appellant did not respond to CSSD's request for income information but it is not clear that Appellant was aware of this request.[36] Appellant filed a request for modification of administrative support order on September 10, 2001.[37]On January 8, 2002 CSSD issued a Modified Administrative Child Support Order which added the second child to the

[28] Exhibit 19. Mailing address listed as 700 Jack Street, Anchorage, Ak 99615.
[29] *Id.* Physical address listed as 1170 Iowa St., Pleasantville, NJ, 08232.
[30] Exhibit 88.
[31] Exhibit 21.
[32] Exhibit 42.
[33] Exhibit 43.
[34] Exhibit 47.
[35] Exhibit 48-49.
[36] Brief of Appellee, filed December 16, 2011 at 7. (At about this same time, there was back and forth between Ms. Corso and Appellant on the need for services. *See* Brief of Appellant at 8-9; Brief of Appellee at 6-8; Exhibits 50-52, 57, 58, 61-62.)
[37] Exhibit 63. It is not clear that Appellant ever filed income information in support of this request.

administrative order.[38] Attempts to serve this order on Appellant were unsuccessful and this order was never adopted.[39]

In 2008, Appellant filed a Motion to Vacate Default Order with CSSD.[40] CSSD sent notice to Ms. Corso of his request and held an administrative review.[41] On May 6, 2010, CSSD issued an administrative review decision granting Appellant relief from the administrative child support order because it was based on a default amount.[42] Both Ms. Corso and Appellant appealed this order.[43]

A formal hearing was held on September 1, 2010 and October 25, 2010 before ALJ Jeffrey Friedman. ALJ Friedman made a decision that Appellant was not entitled to relief because the April 27, 2000 order had been issued AS 25.27.170 not under AS 25.27.160.[44] Because Appellant was not entitled to vacation of the order, the ALJ found that the order could only be modified prospectively based on income, and therefore modified from February 2009 onwards upon evidence provided at the hearing.[45]

In response to the ALJ's decision, CSSD filed a "Proposal for Agency Action" to the Commissioner submitting that CSSD had the authority under 15 AAC 125.121 to vacate default orders regardless where the order was an original

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[38] Exhibits 64-66.
[39] Brief of Appellee at 10; Brief of Appellant at 9. This order was never adopted, and the April 27, 2000 order remained in effect. *See* Exhibit 72, 143, 147.
[40] There were actually two separate motions filed, for reasons not relevant here. *See* Exhibit 102 (filed October 2008); Exhibit 103 (filed December 2008).
[41] Exhibit 110.
[42] Exhibit 112-135.
[43] Exhibits 135-141.
[44] Exhibit 146-157.
[45] Exhibit 152.

NFFR or an order following a formal hearing.[46] Appellant also filed a Proposal for Agency Action.[47] On December 28, 2000, the ALJ decision was adopted by Deputy Commissioner Jerry Burnett holding that Appellant was not entitled to a default order vacated because an administrative hearing officer had issued the April 27, 2000 order, not the agency.[48]

STANDARD OF REVIEW

For child support appeals, the superior court may inquire whether the agency has proceeded without or in excess of jurisdiction, whether there was a fair hearing, and whether there was prejudicial abuse of discretion.[49] "Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."[50] The court may exercise its independent judgment on the evidence, and may find abuse of discretion if the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in light of the whole record ."[51] If the court finds that the there is evidence which was improperly excluded, the court may remand the case to be reconsidered in light of that evidence.[52]

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[46] Exhibit 160-168.
[47] Exhibit 171-176.
[48] Exhibit 183.
[49] AS 25.27.220(b).
[50] AS 25.27.220(b).
[51] AS 25.27.220 (c).
[52] AS 25.27.220(d).

[redacted]

For legal questions where agency expertise is implicated, such as where an agency interprets its own regulations, the Court applies a reasonable basis test.[53] The Court must defer to the agency's interpretation "unless it is unreasonable."[54]

For legal questions where agency expertise is not implicated, the Court applies a substitution of judgment test.[55] Statutory and constitutional claims are evaluated using this test.[56] Even if the decision "has a reasonable basis in law," the Court substitutes "its own judgment for that of the agency" to determine the meaning of the applicable law.[57]

DECISION ON APPEAL

Appellants bring forth three main arguments on appeal. First, they argue that Appellant's due process right to a fair hearing was denied by lack of notice about the appeal hearing.[58] Second, they argue the statutory scheme gives an ALJ authority to vacate default orders when those orders were affirmed by a formal hearing officer with the Department of Revenue.[59] Third, they argue that CSSD

[53] *See Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 332 (Alaska 2009); *Handley*, 838 P.2d at 1233.
[54] *Squires*, 205 P.3d at 332.
[55] *Borkowski v. Snowden*, 665 P.2d 22, 27 (Alaska 1983); *Cassel v. State Dept of Admin.* 14 P.3d 278, 282 (Alaska 2000); *Bickford v. State Dept of Education and Early Development*, 155 P.3d 302, 309 (Alaska 2007).
[56] *See Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971)
[57] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903-04 (Alaska 1987).
[58] Brief of Appellant at 30.
[59] Brief of Appellant 16.

should have reduced the child support for the periods that Appellant was living with Ms. Corso.[60]

Appellee argues that CSSD provided proper notice as required under due process because they sent the notice to the address in New Jersey.[61] They argue that the statute only allows vacation of orders created under AS 25.27.160.[62] Finally, they argue Appellant did not prove that he was living with Ms. Corso at the 2000 appeal hearing, (since he did not appear), and that the order issued after that appeal cannot be retroactively modified under the regulations.[63]

I. *Was Appellant given notice of the February 9, 2000 appeal hearing as required under due process?*

The determination on whether Appellant received notice of the February 9, 2000 hearing is a question of fact, to be upheld if substantial evidence supports the decision. If Appellant was not given notice of the appeal hearing, than the April 27, 2000 decision would be void.

In this case, the record lacks substantial evidence that Appellant received notice. Appellant wrote the mailing address on the hearing form as the Anchorage

[60] Brief of Appellant at 36.
[61] Brief of Appellee at 4-5, 22.
[62] Brief of Appellee at 2, 13-14, 15-16 (arguing that the order under AS 25.27.160 was superseded by the order entered on behalf of the Commissioner under AS 25.27.170).
[63] Brief of Appellee at 13-14.

address. Notice was not sent to this address but was sent to the New Jersey address.[64]

Appellee argues that during a January 24, 2000 phone call, Appellant told CSSD to change his mailing address to the New Jersey address he shared with Ms. Corso.[65] However, Appellee fails to provide evidence to that effect. Appellee attempts to prove service based on inconclusive evidence and assumptions not based in the record. They argue the request for formal hearing written in blue ink, with an arrow drawn to the New Jersey address written in black ink means that "it appears that a CSSD official added the new address before referring the request to the hearing office that same day".[66] Appellee also provides a CSSD form that notes address change based on "phone call from the Noncustodial parent".[67] They state this proves that Appellant "presumably asked CSSD to change his mailing address... ."[68] Finally, they produce an affidavit from Ms. Foley attempting to prove that Appellant requested the change, but instead rehashes the assumptions. [69]

Appellant argues that he did not intend to get mail at the New Jersey address, and that the record provided by CSSD does not prove he requested an address change.[70] Appellant filed an affidavit stating that he did not ask for an

[64] Exhibit 21.
[65] Brief of Appellee at 22-23; Exhibit 191.
[66] *Id. at 23.*
[67] *Id.* at 24; Appellee Exhibit 192.
[68] *Id.* at 4.
[69] *See* Affidavit of Ms. Foley filed December 16, 2011.
[70] Reply Brief of Appellant at 24.

address change and that all the handwriting on the form is his own.[71] He does not recall why the form has both blue and black ink.[72]

Appellant also argues that the notice was sent by certified mail, and that CSSD has failed to provide the green card showing that the mail was ever received.[73] Although service is considered complete upon mailing[74], the Court agrees that a green certificate of service would be helpful in this determination. This would prevent a party from denying service where it was mailed to the last known address.[75]

The Court finds that Appellee failed to prove by substantial evidence that notice of the February 9, 2000 hearing was served on the Appellant.[76] CSSD did not send the notice to the last known mailing address given by Appellant. CSSD has failed to prove that Appellant received notice at another address. The Court

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[71] Affidavit of Mr. Edwards, filed February 20, 2012, marked as Exhibit 194-200.
[72] *Id.*
[73] Reply Brief of Appellant at 23, filed May 25, 2012.
[74] Civil Rule 5(b). *See Maloney v. Maloney*, 969 P.2d 1148, 1153 (Alaska 1998); *Platnikoff v. Johnson*, 765 P.2d 973, 976-77 (Alaska 1988); *Crumpler v. State, Dept. of Revenue*, 117 P.3d 730, 733 (Alaska 2005).
[75] *See Crumpler*, 117 P.3d at 733-734.("There is no dispute that Crumpler used to live at the Fairbanks address where CSED sent its notice. A certificate of mailing was signed by CSED on the December 2002 notice and is sufficient proof to satisfy the requirements of Civil Rule 5(f). Two affidavits were submitted by CSED verifying that the notice was mailed by first-class mail to the most current mailing address in the CSED system.")
[76] Inspection of the four volume record also does not provide this evidence. The Court notes that the record does contain a "return to sender" for the New Jersey address from April 27, 2000, showing that the Appellant was not getting mail on that date. (See Agency Record 48, marked "Exhibit 3, page 7/7".) Additionally, the Court notes that on March 14, 2001 the post office responded that Appellant was "not known at address given" for the 1170 Iowa St. Pleasantville, NJ address on an address information request sent by CSSD. (See Agency Record 665). While this does is not conclusive of the address for the February 9, 2000 hearing, the Court finds this relevant to the discussion.

agrees with Appellant that the lack of notice makes the April 27, 2000 order void, such that the March 1999 order is the only remaining order.[77]

II. *Does the statute allow an Administrative Law Judge to vacate orders under 25.27.170?*

Appellant argues that the ALJ has authority to vacate orders including orders that are approved on behalf of the Commissioner under AS 25.27.170.[78] Appellant argues that the statute outlines the overall appeal process, and that this process means the ALJ makes the final agency decision in appeals from state agencies.[79] They argue that the decision to uphold the child support order under AS 25.27.170 is just a step in the appeal process and that the order remains a default order under AS 25.27.160. [80] They also argue that the intent of the statue is to allow anyone with a default order to get it vacated and replaced with an order based on their actual income and ability to pay.[81]

Appellee argues that the plain language of the statute "vacate an administrative support order issued by the agency under AS 25.27.160" means that the CSSD, as the agency, can only vacate orders issued under AS 25.27.160.[82] They argue that April 27, 2000 order entered on behalf of the Commissioner during the appeal

[77] Reply Brief of Appellant at 24.
[78] Reply Brief of Appellant at 1-10.
[79] Reply Brief of Appellant at 5-7.
[80] Reply Brief of Appellants at 5-7.
[81] Brief of Appellant at 7.
[82] Brief of Appellee at 16.

superseded the original 25.27.160 order.[83] They argue that although the original amount was based on a default amount, the April 27, 2000 independently determined that these amounts were valid.[84]

As outlined above, the Court finds that Appellant was not given notice of the February 9, 2000 hearing that upheld the 1999 child support calculations. The April 27, 2000 order is void and the 1999 order created under 25.27.160 remains valid. Therefore, The Court does not need to address whether AS 25.27.195(b) allows an ALJ to vacate an order upheld under 25.27.170.

III. Was CSSD in error in not reducing the support for the time Appellant lived with Ms. Corso?

Retroactive modification is allowed where the original order was based on default amounts.[85] Appellee argues that the ALJ cannot modify an order issued under AS 25.27.170.[86] As outlined above, the Court finds the 2000 order is vacated, and therefore the 1999 order stands. The Court finds that Appellant is entitled to a formal appeal hearing under AS 25.27.170 at which time the child support calculation will be addressed. The Appellant, Ms. Corso, and CSSD may bring forth evidence at the hearing to prove why or why not the child support order should be changed. Since this hearing will address the appeal of the original

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[83] *Id.*
[84] *Id.* at 20.
[85] *See Tesenlar v. Spicer*, 74 P.3d 910, 915 (Alaska 2003) (Holding retroactive modification statutorily permitted when paternity disestablished or on motion of obligor when the order was based on a default amount.); *Hendren v. State, Dept. of Revenue, Child Support Enforcement Div.*, 957 P.2d 1350, 1352 (Alaska 1998).
[86] Appellee brief at 26.

[redacted]

default order, changes may be applied retroactively if the hearing officer determines necessary.

Conclusion:

The Court finds that Appellant had a right to notice of the February 9, 2000 appeal hearing. The Court finds that Appellee failed to provide notice of this appeal to Appellant. The Court hereby finds the April 27, 2000 child support order is VOID. The Court REMANDS to CSSD for an appeal hearing to allow Appellant to exercise his statutory appeal rights.

So ordered this 12 day of October 2012.

[redacted]

Pat Douglass, Judge

I certify that on 10/12/12 a copy of this document was sent to the attorneys of record or other: Faxed: Burke/x18 (888-455-1236) Grace 278-4607 Edwards + COSD mail at the address of record:

MC
Clerk