

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF)	OAH No. 10-0592-CSS
B. M. Y.)	CSSD No. 001165963 & 01171918
)	
_____)	

DECISION AND ORDER

I. Introduction

A formal hearing was held on December 13, 2010 to consider the child support obligation of B. M. Y. (Obligor) for the support of her child, M., and to consider a motion to dismiss filed by the Child Support Service Division (the Division). Ms. Y. appeared by telephone. The child, M., is in state custody. Andrew Rawls, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed at the end of the hearing.

This case is Ms. Y.'s late appeal of CSSD's establishment of an administrative child support order for M. Having reviewed the record in this case and after due deliberation, the Administrative Law Judge concludes that the Division's motion to dismiss should be denied because it would work an injustice to strictly apply the appeal deadline in this case. Ms. Y.'s arrears from February 2010 through July 2010 should be set at the minimum, \$50 per month, based on her actual income in 2010, because the evidence does not show that she is unreasonably voluntarily under-employed. Beginning in August of 2010, Ms. Y.'s month child support obligation should be set at \$25 per month because she has been supporting a new child in her home since that time and M. has been in foster care.

II. Facts

A. History

The child M. has been in state custody since February of 2010. Ms. Y. is the child's mother.¹

The Division issued an Administrative Child and Medical Support Order on April 10, 2010.² This order set the Y.'s ongoing child support obligation at \$255 per month based on

¹ Recording of Hearing & Exhibit 1, page 13.

² Recording of Hearing & Exhibit 1, page 8.

imputed full-time year-round minimum wage earnings, plus a PFD.³ The order also established \$255 per month arrears based on imputed income going back to February of 2010.⁴

The order was sent to Ms. Y. in care of D. T., who had been her counselor with Cook Inlet Tribal Council. Ms. Y. had been using this address to receive mail because she had been in out-patient treatment for substance abuse and was couch surfing and living in shelters. The order was signed for, but not actually signed by Ms. Y. or Mr. T. Instead it was signed by H. F.⁵

The deadline for filing an appeal of the Division's Administrative Child and Medical Support Order by filing request for an administrative review was May 13, 2010. Ms. Y. did not file an appeal until November 10, 2010. Ms. Y. did not file a request for an administrative review. Instead, she filed a request for a formal hearing, and later filed a request for a modification.⁶

Ms. Y. testified that she did not get any paperwork telling her what the monthly amount was until shortly before she filed a request for a modification and a request for a formal hearing in November of 2010. At the hearing, Ms. Y. explained that Mr. T. had quit his job while he was working with her and that she did not know Ms. F. At the hearing, Ms. Y. frankly admitted that she had received a call from someone with the Division who had explained to her what her monthly child support had been set at. Ms. Y. testified that she had responded that she could not afford that much because she had not been working.⁷

Prior to the Hearing, the Division filed a motion to dismiss. At the hearing the Division argued that Ms. Y. appeal should be dismissed because she did not file request for an administrative review before the appeal deadline, and since an administrative review had not been conducted since Ms. Y. had not requested one, the case was not ready to be appealed to the formal hearing level formal hearing. The Division's request for a dismissal was denied at the hearing, and the parties were given the choice of having the appeal remanded to the Division to conduct an administrative review or to proceed with Ms. Y.'s appeal of the Division's Administrative Child and Medical Support Order as a formal hearing. Both parties requested

³ Exhibit 1 page 1.

⁴ Exhibit 1 page 7.

⁵ Exhibit 1 page 8.

⁶ Recording of Hearing & Exhibit 2

⁷ Recording of Hearing.

that the appeal proceed as a formal hearing, although the Division maintained its objection to the denial of its motion to dismiss.⁸

At the hearing, Ms. Y. explained that she had been in treatment in Anchorage until she moved to No Name City with her new child's father and had then moved again Another City without the new child's father and had been receiving public assistance since her new child was born in August of 2010. Ms. Y. testified that she has been working with her public assistance caseworker to apply for jobs. Ms. Y. testified that she has also been working with her Office of Child Services caseworker toward reunification with M. Ms. Y. now has regular daytime visitation with M. several days per week and the plan is for M. to start living with her again by May of 2011.⁹

At the hearing, the Division calculated that Ms. Y.'s 2010 monthly child support based on her actual income, including earnings, unemployment benefits and a PFD, but excluding public assistance would be the minimum of \$50 per month income before the new child was born, and \$25 per month using a third party calculation, for the months when M. was in foster care and Ms. Y. was living with her new child.¹⁰

Ms. Y. explained that she has not been employed since before February of 2010. Ms. Y. explained that was pregnant and delivered a child in August of 2010. She moved to a remote area where she has been receiving ongoing treatment for substance abuse and is near M. Ms. Y. has been actively seeking employment since her child was born but has not found any yet.¹¹

B. Findings

1. Based on the evidence in the record, I find that it is more likely than not that Ms. Y.'s 2010 child support based on her actual income would result in a monthly child support amount calculated under the formula in Alaska Civil Rule 90.3(a) of \$50 per month before the birth of her new child in August of 2010 and \$25 while M. is in foster care and her new child is with her.¹²
2. Ms. Y. has not been unreasonably voluntarily under-employed in 2010.¹³

⁸ Recording of Hearing.

⁹ Recording of Hearing- Testimony of Ms. Yeagen

¹⁰ Recording of Hearing.

¹¹ Recording of Hearing- Testimony of Ms. Yeagen.

¹² Recording of Hearing.

¹³ Recording of Hearing.

3. It would work an injustice to strictly apply the appeal deadline in this case and dismiss Ms. Y.'s appeal.¹⁴

III. Discussion

Appeals of administrative child support orders are conducted under the procedures set out in 15 AAC 125.118. The procedures in 15 AAC 05.010 and 15 AAC 05.025-15 AAC 05.040 also apply to these appeals. After an Administrative Child and Medical Support Order is issued establishing an obligor's duty to pay child support, a party may file a request for an administrative review.¹⁵ Under 15 AAC 05.030(k), a hearing officer may waive any administrative appeal requirements or deadlines established in 15 AAC 05.010--15 AAC 05.030 if it appears that strict adherence to the deadline or requirement would work an injustice. The thirty day appeal deadline for requesting an administrative appeal for an Administrative Child and Medical Support Order is therefore subject to the waiver provisions of 15 AAC 05.030(k).

The Division's motion to dismiss should be denied. It would work an injustice not to waive the appeal deadline in this case.¹⁶ Failure to do so will result in Ms. Y. paying child support based on income she did not earn. Ms. Y.'s failure to meet the deadline was at least partly the result of her medical condition, that is, her continuing struggle with substance abuse, the intermittent homelessness that has resulted from that struggle, her efforts to obtain treatment and her move to live closer to M. and work toward family reunification. Furthermore, Ms. Y.'s and her new child are now receiving public assistance, and M. may soon become a member of her household again. Requiring Ms. Y. to pay higher arrears based on imputed income due to her late appeal would likely have an adverse impact both on the child she is presently living with and with M., the child of this order.

Under Civil Rule 90.3, child support may be calculated based on a determination of potential income where there is voluntary unemployment or underemployment.¹⁷ A noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support obligation.¹⁸ The Alaska Supreme Court has indicated that the circumstances surrounding an obligor's failure to maximize earnings should be

¹⁴ Recording of Hearing.

¹⁵ 15 AAC 125.118(a).

¹⁶ 15 AAC 05.030(k).

¹⁷ See Alaska Civil Rule 90.3, Commentary III, C.

¹⁸ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

carefully considered, and then a determination made about whether, under all the circumstances in the case, income should be imputed.¹⁹

Under the circumstances of this case, it is not appropriate to impute income to Ms. Y. Ms. Y.'s failure to earn significant income in 2010 was due to her pregnancy and her unsuccessful attempts to find employment. Ms. Y. has not been unreasonably voluntarily underemployed, and her actual income would result in a minimum child support order. At this point in time, the evidence in the record does not show that making her best efforts to find employment, Ms. Y. will probably earn enough during what remains of 2010 to justify setting support higher than a minimum order.

Civil Rule 90.3(i) sets out how child support should be calculated in third-party custody situations, which include situations where children are in state custody. Since there are two children to whom Ms. Y. owes a duty of support, one who lives with her and one who is in the custody of a third party, Ms. Y.'s support obligation for M. is calculated by dividing her support obligation for two children by two. In this case since Ms. Y. has a minimum order of \$50 per month, her support obligation since her new child's birth is \$25 per month.

Ms. Y.'s ongoing child support obligation will be revisited through the pending modification action. Ms. Y. may have more work search history at her present location or she may be employed or the custody situation may have changed by time the modification process is complete. At present, Ms. Y.'s ongoing child support obligation should be set at \$25 based on her actual income and the current third party custody situation.

IV. Child Support Order

1. The Division's motion to dismiss is denied.
2. Ms. Y. owes ongoing child support for M. in the monthly amount of \$25, effective January 1, 2011.
3. Ms. Y. is liable for child support arrears for M. in the monthly amount of \$50 for the months of February 2010 through July 2010, and in the monthly amount of \$25 for the months of August 2010 through December 2010.
4. The Division will allocate arrears and ongoing child support between the two cases covered by this order.

¹⁹ See *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 2002).

5. All other provisions of the Division's Administrative Child Support and Medical Support Order issued on April 10, 2010 remain in effect.

DATED this 14th day of December, 2010.

By: Signed
Mark T. Handley
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Under AS 25.27.062 and AS 25.27.250, the obligor's income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 3rd day of January, 2010

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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