

II. Facts

A. Procedural History

This child support proceeding was initiated after Mr. N was arrested on felony charges in February, 2010, and B and C were placed in state custody beginning in March, 2010.⁴ The Child Support Services Division issued an administrative support order on June 11, 2010. A copy of the order was sent to Mr. N, and he received it on June 17.⁵ Mr. N wrote to the Division on July 20, stating that he was unable to work due to his bail conditions, and requested that his child support obligation be set accordingly.⁶ On October 22, 2010, the Division issued an amended administrative support order setting support in the amount of \$402 per month for two children effective November 1, 2010, with arrears from March 1-October 31, 2010.⁷ The amended order was sent to Mr. N at XXXX in no name city.⁸

In letters to the Division dated January 10 and 19, 2011, Mr. N requested a reduction in the amount of the support order and adjustment of past due amounts, noting that B had been released from state custody and that he was incarcerated, and that he “had previously requested a review and received no response.”⁹ In response to these letters, on January 24, 2011, the Division suspended the support obligation for B, effective October, 15, 2010,¹⁰ and, on March 30, 2011, initiated modification review.¹¹ On April 5, 2011, Mr. N provided information in response to notice of modification review.¹² On April 11, 2011, the Division adjusted the amount of support owed on the October 22, 2010, amended support order to \$298 per month for one child (C), effective

⁴ See Ex. 1, p. 7.

⁵ Ms. Briann accessed this information in the Division’s records at the time of the hearing.

⁶ Ex. 5, pp. 8-9. This exhibit bears a handwritten notation referencing CSSD No. 001122448. This case concerns CSSD Nos. 001167155 and 001170023. It is unclear who made the handwritten notation. The information provided pertains to CSSD Nos. 001167155 and 001170023. If the Division has another case involving Mr. N, under CSSD No. 001122448, the information provided may be relevant in that case as well. The Division should review its records and determine whether the information affects CSSD No. 001122448.

⁷ Ex. 1. Both case numbers refer to the same obligor and children. The Division collects support for all periods of time during which the children are in nonfederal foster care in CSSD No. 001170023. For all other time periods, the Division collects support in CSSD No. 001167155. Ex. 1, p. 7.

⁸ Ex. 1, p. 10.

⁹ Ex. 2.

¹⁰ Ex. 3.

¹¹ Ex. 4

¹² Ex. 5, pp. 1-7.

November 1, 2010.¹³ On May 20, 2011, the Division issued an order purporting to modify the initial administrative support order, dated June 11, 2010, and setting ongoing support at the rate of \$50 per month for one child, effective April 1, 2011.¹⁴

Mr. N filed an appeal of the modified administrative support order dated May 20, 2011.¹⁵

B. Material Facts

M J. N has two children, B A-N and C Z. N. Mr. N was arrested on felony charges in February, 2010,¹⁶ and his children were placed in state custody beginning in March, 2010.¹⁷ In April, 2010, B turned 18, but she remained in state custody.¹⁸ Prior to the end of May, 2010, Mr. N was subject to bail conditions that prevented him from working.¹⁹ Prior to that time, he had been employed by no name, and operated a small personal business on the side.²⁰ His total income in 2010, prior to losing his job, was \$19,457.²¹

B was released from state custody on October 15, 2010. On November 10, 2010, Mr. N appeared in the superior court and entered a plea of guilty on a felony charge;²² he was jailed on December 15, 2010, and has been incarcerated since then.²³ He is scheduled for release in 2017.

¹³ See Ex. 6.

¹⁴ Ex. 7.

¹⁵ Ex. 8.

¹⁶ The administrative law judge takes official notice that on February 20, 2010, Mr. N was charged with felony sexual assault in State v. M N, No. 3PA 10-0000CR, based on records maintained on the Alaska Court System's website. A party objecting to consideration of that information may state their objection in a proposal for action. See 2 AAC 64.300.

¹⁷ See Ex. 1, p. 7.

¹⁸ See Ex. 1, p. 8.

¹⁹ Ex. 2.

²⁰ See Ex. 5, pp. 8-9.

²¹ This amount is what Mr. N reported to the Division in 2010, when the initial child support order was issued. See Ex. 1, pp. 5, 6, 8. In April, 2011, he reported 2010 total income of \$14,220. See Ex. 5, p. 6. The discrepancy is unexplained in the record.

²² The administrative law judge takes official notice that on November 10, 2010, Mr. N appeared in the superior court and entered a plea of guilty on felony charges in State v. N, No. 3PA 10-0000CR, based on records maintained on the Alaska Court System's website. A party objecting to consideration of that information may state their objection in a proposal for action. See 2 AAC 64.300.

²³ Ex. 3, p. 9; Post Hearing Brief. The administrative law judge takes official notice that on December 15, 2010, Mr. N was arraigned on assault charges in State v. N, No. 3PA 10-00000CR, based on records maintained on the Alaska Court System website. A party objecting to consideration of that information may state their objection in a proposal for action. See 2 AAC 64.300.

II. Discussion

A. The January 10 Letter Is Accepted As An Appeal

The initial child support order in this case was issued on June 11, 2010. The Division issued an amended support order on October 22, 2010. On October 26, a copy of the amended order was sent to Mr. N's correct address in no name city.²⁴ At the hearing in this case, Mr. N asked that his January 10 letter be accepted as an appeal of the October 22 amended order.

A person who files an appeal within 30 days of the date of an amended administrative order is entitled to an administrative hearing.²⁵ Service of an amended order may be accomplished by mailing the order to the obligor's mailing address of record.²⁶ The administrative law judge may grant an untimely request for an administrative hearing when strict adherence to the filing deadlines and other requirements would work an injustice.²⁷

Factors that may be considered in determining whether to grant an untimely request for an administrative hearing in a child support proceeding include: (1) the reasons for the delay; (2) the extent of the delay; (3) the degree of prejudice to the other parties; (4) the strength and nature of the asserted grounds for the appeal; (5) whether the agency's determination was previously contested; and (6) any other relevant circumstances.²⁸

(1) Reasons For Delay

Mr. N contends that he did not file a timely appeal because he did not receive the copy of the amended order that was mailed to him, even though it was mailed, as he conceded at the hearing, to his correct address. There is no evidence to rebut his

²⁴ Pursuant to 15 AAC 125.810(b), the Division was required to send a copy of the amended order to Mr. N within 14 days after the order was issued.

²⁵ 15 AAC 125.118(f); 15 AAC 05.010(b)(6).

²⁶ AS 25.27.160(a) specifies that an action to establish a duty of support is initiated by serving a notice and finding of financial responsibility, which must be served personally or by registered or certified mail. Subsequent documents may be served in accordance with Alaska Civil Rule 5 or by any other method permitted by law. *See* AS 25.27.265(a). Parties are required by law to provide their residential and mailing addresses to the Division and to "immediately" inform the Division of any change. AS 27.25.265(b).

²⁷ 15 AAC 05.030(k).

²⁸ *See, e.g., In Re R.L.B.*, OAH No. 08-0646-CSS, at 3-5 (Commissioner of Revenue 2009); *In Re A.B.H.*, OAH No. 07-0655-CSS, at 2 (Commissioner of Revenue 2007); *In Re L.(M.)A.*, OAH No. 06-0610-CSS at 3 (Commissioner of Revenue 2006).

testimony. Moreover, his testimony that he did not personally receive a copy of the amended order within the time allowed for filing an appeal is supported by other evidence in the record.²⁹ In any event, even if the amended order was delivered to Mr. N's correct address, the circumstances of this case suggest that it might reasonably have escaped his notice: at the time, Mr. N was facing serious criminal charges, to which he pleaded guilty within the time period for filing an appeal. It is clear from the record, certainly, that Mr. N did not acquiesce to the amended support order.

This factor supports a waiver.

(2) Extent of Delay

Mr. N's appeal should have been filed by November 25, 30 days after the amended order was mailed to him. The January 10 letter was submitted 46 days after the deadline for filing an appeal.

Because of the relatively short period of delay, this factor supports a waiver.

(3) Prejudice

The failure to file a timely appeal did not result in any prejudice to the custodian, because while the children were in state custody they were not dependent on support from Mr. N. Indeed, since Mr. N was unable to work, no support was being collected from him, and his older daughter, B, had already been released from state custody and was emancipated.

This factor supports a waiver.

(4) Strength Of Appeal Grounds

The facts in this case are uncontested. In his July 20, 2010, request for administrative review, Mr. N informed the Division that he was unable to work, that he would remain unable to work unless his criminal case was resolved in his favor, and that he anticipated remaining unable to work for a period of at least another four to six months even if he was eventually acquitted. The Division's October 22, 2010, amended support order acknowledged Mr. N's inability to work, but rather than setting ongoing support at the minimum amount based on his inability to work, it set ongoing support based on his year-to-date earnings.

²⁹ Mr. N testified that he contacted the Division by telephone about the time the amended order was issued. In addition, his January 10 letter references a contact with the Division about that time.

Based on the anticipated period of involuntary unemployment, and in the absence of any evidence that Mr. N had liquid assets sufficient to meet his child support obligation while he was unable to work, the undisputed evidence provided strong support for reducing the amount of Mr. N's ongoing support obligation to the minimum amount of \$50 per month during the period of unemployment.

Because the uncontested evidence strongly suggests that the amount of ongoing support set in the amended support order was erroneous, this factor supports a waiver.

(5) Prior Contest

When the issues raised in an untimely appeal have previously be considered by the Division in an administrative review, this factor typically weighs against a waiver of the time for filing an appeal from the review decision.³⁰ In this case, the administrative review decision states that the Division took into account Mr. N's inability to work in setting the ongoing support obligation.

Because the Division has previously considered Mr. N's inability to work, this factor does not support accepting an untimely appeal.

(6) Other Circumstances

Mr. N is incarcerated, and will remain so for at least another five years. While he is incarcerated, he has no means of earning income to pay the arrears that have already accumulated on a possibly erroneous amended support order. Under these circumstances, to maintain an obligation for arrears for support that should not have been imposed in the first place would be manifestly unjust.³¹

(7) Conclusion

In light of the relatively short delay in requesting relief, the existence of extenuating circumstances with respect to the failure to timely file an appeal, the existence of uncontested evidence that the amended support order is erroneous, and Mr. N's inability to pay accumulated arrears while he is incarcerated, strict adherence to the filing deadline would work an injustice. Mr. N's January 10 letter is therefore accepted as an appeal of the October 22, 2010, amended administrative order.

³⁰ See *In Re R.L.B.*, *supra*, at 3, note 20.

³¹ See 15 AAC 125.650(a)(3)(B); -.655 (providing for forgiveness of arrears owed by an incarcerated obligor).

C. The Amended Support Order is Amended

The amended administrative order dated October 22, 2010, set Mr. N's ongoing support obligation, effective March 1, 2010, at \$402 for two children, based on his year-to-date income, annualized for the full year. The effect of the order was to impose an ongoing support obligation for an extended period of time during which Mr. N was unable to work.

Undisputed evidence presented to the Division before it issued the amended support order in October, 2010, established that Mr. N had been involuntarily unemployed since at least July, 2010 (on appeal he established the period of involuntary unemployment began no later than June 1, 2010). At the time it issued the amended order, the Division was aware that Mr. N would have no ability to return to work before his trial on the outstanding criminal charges, which was not expected to occur for at least another four to six months, and that unless he was acquitted at trial he would have no ability to return to work until after serving his sentence. Since the majority of defendants who are tried on felony charges are convicted, the undisputed evidence that was before the Division at the time it issued the amended support order established that Mr. N would more likely than not remain unemployed for at least another full year. In light of that undisputed evidence, rather than setting an ongoing support obligation for the entire year based on annualized income, the correct course was to reduce the ongoing support obligation to reflect a change in circumstances that was more or less permanent in nature, namely, that Mr. N was involuntarily unemployed and would remain so for the foreseeable future.

IV. Conclusion

Mr. N's January 10, 2011, letter should be treated as an untimely appeal of the October 2, 2010, amended support order. In light of the relevant circumstances, it would be manifestly unjust not to extend the time for filing an appeal by 46 days. The amended support order is in error. The modified support order should be vacated and superseded by a revised amended support order setting arrears and ongoing support at the proper amounts.

ORDER

1. The time for filing an appeal of the October 22, 2010, amended administrative support order is extended and Mr. N's letter dated January 10 is accepted an appeal of that order.

2. The Modified Administrative Support Order dated May 20, 2011 is **VACATED**.

3. The Amended Administrative Child Support and Medical Support Order dated October 22, 2010, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated October 22, 2010, is **AFFIRMED**:

Arrears are set at \$402 per month for two children for the period March 1-May 31, 2010; at \$50 per month for two children for the period June 1-October 31, 2010, and at \$50 per month for one child for the period November 1, 2010-October 31, 2011.

Ongoing support is set at \$50 per month for one child effective November 1, 2011.

DATED: October 6, 2011.

Signed

Andrew M. Hemenway
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 26th day of October, 2011.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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