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

In the Matter of:	)	
	)	OAH No. 13-0952-CSS
K W. F	)	CSSD No. 001016419
	)	

DECISION AND ORDER

I. Introduction

Pursuant to a default review, the Child Support Services Division (CSSD) vacated a prior child support order and issued a new child support order determining that K F owed arrears of $31,194.51. The custodial parent, U T, contested that ruling and requested a hearing. The obligee child is S, who turned 18 in March of 2007.

A hearing was held on July 24, 2013. All parties participated by telephone. Ms. T represented herself, and testified on her own behalf. Mr. F was represented by counsel. Mr. F did not testify or submit additional evidence. CSSD was represented by its lay advocate, Child Support Specialist Erinn Brian. The record was re-opened after the hearing and the parties were asked to provide additional briefing on two issues.

Because CSSD did consider all of the required factors that must be reviewed before granting a default review, and because CSSD's support obligation calculations are inconsistent from one year to the next and do not appear to be in accordance with applicable regulations, this matter is remanded to CSSD to determine whether the prior default order should be vacated and, if so, to recalculate Mr. F's child support obligation.

II. Facts

A. Procedural history

CSSD issued a Notice and Finding of Financial Responsibility (NFFR) on May 14, 1990, setting Mr. F's ongoing child support at $752 per month, and also establishing arrears from March 1, 1989.[1] Approximately 17 years after the 1990 NFFR, Mr. F requested a default review. On May 7, 2007, CSSD vacated the prior order, and set arrears at $31,194.51 for the

[1] Exhibit 1. This order was entered pursuant to AS 24.27.160.

period March 1, 1989 through April 30, 2007.[2] The order did not set any ongoing support, presumably because S had turned 18 by that time.

Ms. T appealed the May 7, 2007 order and a hearing was held. Mr. F did not appear at that hearing. Administrative Law Judge Whitney issued a proposed decision which was adopted as the final agency action on November 6, 2007.[3] This decision reinstated the May 14, 1990 NFFR. There is nothing in the record to indicate whether the November 6, 2007 agency action was ever appealed.

Four and one-half years later, on February 13, 2012, Mr. F called CSSD.[4] He asked about obtaining a review of the existing support order. He was told he could request another default review and that CSSD would send the appropriate paperwork to request a review.[5] However, on February 15, 2012, CSSD informed Mr. F that he was not entitled to a default review.[6] CSSD informed Mr. F that he could appeal to the Superior Court.

Mr. F did appeal to the Superior Court. The court remanded this matter to CSSD to conduct a "formal administrative hearing pursuant to 15 AAC 125.121(f)." Administrative Law Judge Howard, after hearing from the parties, determined that it was premature to hold a hearing as a written request for a default review had not been submitted, CSSD had not considered and acted on that written request, and CSSD had not issued an administrative review decision.[7] Accordingly, Judge Howard remanded this matter to CSSD to make its initial administrative decision.

Mr. F submitted his written Motion to Vacate Default Order.[8] On June 6, 2013, CSSD once again vacated its May 14, 1990 NFFR, and issued a new child support order setting arrears at $31,194.51 for the period March 1, 1989 through April 30, 2007.[9]

Ms. T appealed the Administrative Review Decision.[10] CSSD submitted a pre-hearing brief with attached exhibits on July 22, 2013. Ms. T submitted additional exhibits on July 23,

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2 Exhibit 2.
3 Exhibit 4, page 9.
4 Ms. T's Exhibit 4 (note from CSSD's records).
5 *Id.*
6 Exhibit 5.
7 Exhibit 8.
8 Exhibit 9.
9 Exhibit 11. This is the same amount as was calculated in May of 2007, and represents a reduction from over $200,000 in accrued arrears under the 1990 NFFR.
10 Exhibit 12.

2003.[11] At the hearing, CSSD asserted that the support obligation calculations in its June 6, 2013 order were incorrect.[12]

After the hearing, the undersigned administrative law judge requested additional briefing on two issues. The parties were to address whether CSSD had made a finding of undue hardship or reasonable reliance on the default order as required by 15 AAC 125.121(e). In addition, CSSD was asked to explain the basis for its calculations as there appeared to be inconsistencies or incorrect calculations.

B. Material facts

Records from the Department of Labor[13] show that Mr. F received the following income in wages and unemployment benefits:

Year	Wages	Unemployment Benefits	Total
1989	13,230.91	0.00	13,230.91
1990	9,478.89	452.00	9,930.89
1991	0.00	0.00	0.00
1992	0.00	0.00	0.00
1993	0.00	0.00	0.00
1994	12,421.00	0.00	12,421.00
1995	2,623.56	348.00	2,971.56
1996	0.00	1,006.00	1,006.00
1997	0.00	732.00	732.00
1998	0.00	0.00	0.00
1999	0.00	0.00	0.00
2000	0.00	0.00	0.00
2001	0.00	0.00	0.00
2002	0.00	0.00	0.00
2003	0.00	0.00	0.00
2004	0.00	0.00	0.00

[11] CSSD's exhibits are numbered 1 – 13. Ms. T also submitted exhibits, which are numbered 1 – 4. An "S" has been added to each page of Ms. T's exhibits to distinguish them from CSSD's.

[12] CSSD submitted a pre-hearing brief just two days earlier. That brief contained no suggestion that CSSD had any concerns about the calculations.

[13] Exhibit 13.

2005	0.00	0.00	0.00
2006	36,612.35	0.00	36,612.35
2007	50,469.03	0.00	50,469.03

It is undisputed that the parties have one child, S, born in 1989. S turned 18 in 2007, and graduated from high school in May of 2007.[14]

III. Discussion

A. Introduction

A parent is obligated both by statute and at common law to support his or her children.[15] Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources."[16] CSSD uses the best information available to determine a parent's income.[17] The person appealing CSSD's decision has the burden of demonstrating that the decision is incorrect.[18]

B. It was permissible to conduct a default review in this matter

CSSD issued the May 14, 1990 NFFR based on default information rather than Mr. F's actual ability to pay. That order was issued pursuant to AS 25.27.160. CSSD has the authority to review and vacate orders issued pursuant to AS 25.27.160, and can do so at any time, even many years later.[19] When an administrative order is contested, and an administrative hearing is held and a new order issued under AS 25.27.170, CSSD is not authorized to conduct a default review and vacate the new order.[20] Instead, the method of contesting the final agency decision is to appeal to the Superior Court within the proper time period. Mr. F did not appeal ALJ Whitney's 2007 order. However, when he requested a default review in 2013 he was told he could appeal to the Superior Court. He did, and the appeal resulted in the Superior Court directing CSSD to conduct a hearing pursuant to 15 AAC 125.121(f). Given the Superior

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14 Testimony of Ms. T.

15 *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

16 *See* 15 AAC 125.010 (Adopting Civil Rule 90.3 by reference).

17 15 AAC 125.050.

18 15 AAC 05.030(h).

19 AS 25.27.195; *In re R.P.J.*, OAH No. 10-0048-CSS (Commissioner or Revenue 2010), pages 10 – 11. Published OAH Child Support decisions referred to in this decision are available online at http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=CSS.

20 *In re G.L.E.*, OAH No. 10-0287-CSS (Commissioner of Revenue 2010) page 5, *reversed on other grounds, Edwards v. State*, 3AN-11-5401 CI. *See* Exhibit 8, page 3, footnote 20.

Court's Order, it was appropriate to conduct a hearing. However, no hearing could be held until CSSD first considered and took action on Mr. F's request. Thus, ALJ Howard remanded this matter to CSSD to make the initial ruling on Mr. F's request to set aside the 1990 NFFR. Because the Superior Court remanded for the purposes of holding a hearing, and because no hearing could be held before CSSD conducted a default review and made a decision regarding that review, it was appropriate for CSSD to conduct the default review.

C. CSSD's default review on remand

The applicable regulation states, in part,

> The agency will grant the request to vacate the support order if the agency finds that the support order was based on a default income figure and that granting the request will not cause undue hardship to a party because of the party's reasonable reliance on the support order.[21]

The Administrative Review Decision in this case states that the prior order should be vacated because it was based on a default income amount.[22] There is no finding by CSSD that vacating the prior order would not cause undue hardship because of a party's reasonable reliance on the prior order. In its post hearing brief, CSSD concedes that it "did not make findings related to undue hardship."[23] CSSD also asserted that it was not required to make any finding regarding hardship.[24]

CSSD's position is contrary to the plain language of the regulation quoted above. It is possible to imagine situations where a custodial parent has reasonably relied on the existence of the prior support order and where retroactively setting that order aside would cause the custodial parent undue hardship. The Department's regulation requires a finding that there is no undue hardship based on reasonable reliance before an order based on default income amounts may be set aside. This protection has been built into the regulation, and CSSD must comply with its requirements. CSSD cannot vacate every administrative order that was based on a default income amount. It can only vacate those orders after determining that granting the request will not cause undue hardship because of a party's reasonable reliance on the support order.

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21 15 AAC 125.121(e) (emphasis added).
22 Exhibit 11, page 3.
23 CSSD's brief dated August 5, 2013.
24 *Id.*

Mr. F notes that there could have been no undue hardship in 2013, when the default income order was set aside, because S was emancipated in 2007, six years earlier. It is likely that undue hardship based on reasonable reliance would be rare in this situation, but this is not a proper subject for official notice,[25] and it is not possible to make that factual finding in this case without first giving Ms. T the opportunity to present evidence on this issue.[26]

Ms. T does have the burden of proof on this issue, and she did not present any evidence of undue hardship or reasonable reliance. However, the Administrative Review Decision states that the only reason for setting aside the prior order was that it was based on a default income amount.[27] This was not sufficient to place Ms. T on notice that hardship and reasonable reliance were at issue.

CSSD is required to determine whether setting aside the 1990 NFFR will cause undue hardship as a result of Ms. T's reasonable reliance on the existence of that NFFR.

D. CSSD's new calculations

If CSSD finds that setting aside the 1990 NFFR will not cause undue hardship to Ms. T, then it will need to recalculate Mr. F's child support obligation for each year.[28] It did recalculate his support obligation in its most recent administrative order, stating,

> The income calculations for 1989 through 2007 were based on the Child Support Guidelines Affidavits provided by Mr. F, combined with historical earnings reported by the Alaska Department of Labor, Internal Revenue Service and Social Security Administration. The income calculations for 1992/1993 were estimated based on in-kind contributions Mr. F received from house mates that resided in his home. Since Mr. F was able to satisfy his monthly mortgage without having reported wages, the monthly mortgage amount was used to determine his annual earnings. There is not sufficient documentation to qualify Mr. F's unemployment for 1998 – 2002 as voluntary due to a pre-existing medical condition.[29]

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[25] *See* 2 AAC 64.300(a). Mr. F asked that judicial notice be taken that there could be no hardship. This legal concept is generally referred to as official notice in administrative proceedings.

[26] Unless she has a high paying job or other source of income, any failure to pay child support would likely have caused hardship. The hardship at issue here, however, is not that caused by a failure to pay, but hardship that may have resulted from Ms. T's reasonable reliance on the existence of the 1990 NFFR and any arrears that accrued because of that order. For example, she may have incurred expenses or debt based on an expectation of receiving the amount of accrued arrears. If CSSD finds that her actions were reasonable, and that setting aside the 1990 NFFR would create an undue hardship, then it may not set aside that order during a default review even though it had been based on default income.

[27] Exhibit 11, page 3.

[28] 15 AAC 125.121(e).

[29] Exhibit 11, page 9.

Except for the Department of Labor information shown in Exhibit 13, summarized in the chart in section II B, above, the documentation referred to by CSSD in its order is not part of the record. Mr. F's attorney asserted that the documentation was submitted by Mr. F in 2007, and that CSSD subsequently lost it. However, no admissible evidence was submitted to support that assertion. Ms. T argued that it was Mr. F's obligation to submit sufficient documentation for CSSD to review, and that he failed to do so.

The 2013 arrears calculation in Exhibit 11 is identical to the 2007 calculation in Exhibit 2 and the language used to justify those calculations is nearly identical. Therefore, it is reasonable to conclude that CSSD simply reinstated the calculations from Exhibit 2 without re-examining the underlying documentation.[30] CSSD had at least some of the information from Mr. F, as required by 15 AAC 125.121(b) & (c), to consider his request to vacate the default order in 2007.[31] It was within CSSD's discretion to determine whether the information provided by Mr. F was sufficiently complete to accept his request to vacate the default order in 2007, and it is also within CSSD's discretion to simply reuse the calculations from that time, rather than require Mr. F to resubmit his income information and have it reconsidered by CSSD. However, those calculations must still be correct for them to be relied on in any final order.

When calculating arrears for individuals who are not voluntarily unemployed or underemployed, there are three permissible methods. The method used depends on the type of income information available to CSSD, and cannot be combined in any single calculation:

1. When CSSD has complete information concerning total income for a year, CSSD uses that information to calculate the award even if the parent worked sporadically or less than full time.[32]

2. If CSSD has limited information, CSSD estimates the total income based on "earnings in prior or subsequent years, job skills, training, work history, and education, and the employment available in the area[.]"[33]

3. If CSSD has no information about the obligor's income, CSSD uses the "Male and Female Average Annual Wage Income by Age Group statistics" to estimate income.[34]

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[30] CSSD asserted that this is what happened, but did not submit any additional evidence to support that assertion.

[31] Exhibit 2.

[32] 15 AAC 125.050(b)(1).

[33] 15 AAC 125.050(b)(2).

In addition, if an obligor is found to be voluntarily unemployed or underemployed, CSSD may impute potential income to the obligor regardless of the obligor's actual income.[35] On the other hand, CSSD may not impute potential income to someone who is unemployed or underemployed if that individual is not voluntarily and unreasonably unemployed or underemployed.[36]

CSSD was asked to explain the basis for its calculations. CSSD did not, and instead conceded its calculations were wrong, and asked that it be given an opportunity to submit new calculations.[37] Ms. T doubts that CSSD can calculate an accurate child support obligation given the state of the record. Mr. F is also concerned that CSSD may not be able to correctly calculate his support obligation. Both parents' frustration is understandable, but determining the correct support obligation is best done by having CSSD make those determinations first, instead of having them made in the first instance by the Commissioner at the formal hearing level.

IV. Conclusion

This matter is REMANDED to the Child Support Services Division to first determine whether the 1990 default order should be set aside. If that order is set aside, CSSD shall calculate Mr. F's child support obligation in a manner consistent with the regulatory requirements discussed above.

DATED this 14th day of August, 2013.

Signed
Jeffrey A. Friedman
Administrative Law Judge

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[34] 15 AAC 125.050(b)(3).

[35] 15 AAC 125.060(a).

[36] *See In re K.L.M.*, OAH No. 09-0073-CSS (Commissioner of Revenue 2009), page 6; *In re T.A.H, Jr.*, OAH No. 11-0379-CSS (Commissioner of Revenue 2011), page 5.

[37] As discussed in the order asking for additional briefing, the calculations made in 2007, which were reinstituted in the 2013 order, were factually and legally inconsistent, and did not comply with applicable regulations. CSSD is correct to concede that those calculations were incorrect.

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 determination in this matter.

DATED this 30th day of August, 2013.

By: *Signed*
Signature
Jeffrey A. Friedman
Name
Administrative Law Judge
Title

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