Non-Adoption Options

D. The undersigned, 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:

I. Introduction

S H applied for assistance from the Child Care Program. That application was denied by the Division of Public Assistance, Child Care Program Office because Mr. H's calculated household income exceeded the program limit.

The proposed decision in this matter reversed the division's denial finding that Mr. H's self-employment activity changed substantially shortly before he applied for assistance, which impacts the household income calculation. The Division filed a Proposal for Action requesting the proposed decision be amended by finding Mr. H's self-employment was not substantially different from the original activity, and that the division's income calculation was correct and that the agency was correct to deny Mr. H's application.

II. Discussion

At issue here is the application of 7 AAC 41.325(a)(1)(B)(ii) and the attribution of self-employment income. Because Mr. H reported no actual self-employment income, the division is required by regulation to attribute self-employment income if a client goes for 3 months of self-employment without making any money or without making income that exceeds the minimum wage. The attribution calculation is done by multiplying the number of hours Mr. H reported working in his business by the minimum wage, and adding the result to the household income.

Prior to becoming self-employed, Mr. H was employed by Wells Fargo and when Mr. H separated employment he signed a non-compete agreement which limited his ability to marker his services until June 2016.

If Mr. H's self-employment activity after the expiration of his agreement not to compete was substantially different from his self-employment activity prior to the expiration of the agreement, an additional three-month period is allowed before minimum wage is attributed under the regulation.

Conclusion:

Mr. H's self-employment activity during the time he was under the agreement not to compete did not differ substantially from his self-employment activity after the agreement expired. It is not disputed Mr. H was in the financial services field prior to and after the non-

compete agreement was in effect. In addition, there is no indication that the income received from his self-employment activity differed substantially immediately following the expiration of his agreement. Mr. H did rent office space and was able to market his services after the expiration of the agreement not to compete, but that does not constitute substantially different self-employment activity.

The division correctly attributed minimum wage income for the months of June, July and August, 2016. Although the division should more appropriately use a 40 hour week in their calculation, this does not change the ultimate determination the household income would still be over the limit for a household of five.

The division's decision to deny Mr. H's application for child care assistance is upheld.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23 day of December, 2016.

By: *Signed*
Signature
Douglas Jones
Name
Medicaid Program Integrity Manager
Title

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

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	
S H	)	OAH No. 16-1166-CCA
	)	Agency No.

[REJECTED PROPOSED] DECISION

I. Introduction

S H applied for assistance from the child care assistance program. The Department of Health and Social Services, Division of Public Assistance, Child Care Program Office, denied the application because it found that Mr. H's household income exceeded the program limit. Mr. H requested a hearing.

Because Mr. H's self-employment activity changed substantially shortly before he applied for child care assistance, the division's denial of his application is reversed.

II. Facts

S H is working to establish a small business offering financial services. He was previously employed at No Name Business. He was bound by an agreement not to compete with his former employer for one year after leaving No Name Business, so his ability to solicit business was restricted for the period the agreement was in effect. During this period, he accepted odd jobs outside his chosen profession. He began marketing his services in earnest in June 2016, after the agreement not to compete had expired. Mr. H rented an office, and keeps regular office hours there from 9 a.m. to 6 p.m.[1] Mr. H's wife also works.[2]

Mr. H and his wife have three children. Two of the children are in middle school. The third, Mr. H's daughter N, is three years old.[3] N attends the No Name Learning Center in No Name City, at a cost of $1,030 a month.[4]

In August, after opening his investment office but before earning any self-employment income, Mr. H applied to the child care assistance program for assistance with paying for the cost of N's day care.[5] When Mr. H applied for child care assistance, he completed a form. He

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1 Testimony of H.
2 Exhibit 2.11.
3 Exhibit 3.2.
4 Exhibit 2.13, 2.16
5 Testimony of H.

listed all five members of his household.[6] He listed his work hours at his business, as well as his hours and hourly wages for a part time job at his church. The division calculated his average monthly earnings for the church job at $77 a month.[7] He listed his wife's hours and hourly wages for two different dental office jobs.[8] The division calculated her average monthly income at $3,558.[9] Mr. H provided additional information about his business income and expenses.[10] The division then interviewed Mr. H, and requested additional information about the household's income, which he provided.[11] At the time he applied, Mr. H had significant self-employment expenses but no self-employment income.[12] The division nonetheless attributed self-employment income of $1,991.55 a month to Mr. H.[13]

The division calculated Mr. H's self-employment income by multiplying the number of hours Mr. H reported working in his financial services business by the minimum wage. Specifically, it attributed 40 hours a week at $9.75 an hour, plus five hours a week at the overtime rate of $14.63, for a total of $1,991.55.[14]

Adding this figure to the family's earned income, the division calculated Mr. H's family's monthly income at $5,578. Although Mr. H had reported a household size of five people, the division used a household size of four people in making its eligibility determination. The division found that Mr. H's monthly household income exceeded the maximum allowable limit of $4,614 for a family of four. The division denied Mr. H's application for child care assistance.[15]

Mr. H appealed.[16] The division conducted an administrative review. On review, the division determined that Mr. H had a household size of five, not four as stated in its initial denial letter.[17] Thus, the matter of household size has already been resolved and is no longer in dispute in this case. However, the division also found that Mr. H's household's monthly income of

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6 Exhibit 2.10.
7 Exhibit 3.3.
8 Exhibit 2.11.
9 Exhibit 3.5.
10 Exhibit 3.10 - 3.13.
11 Exhibit 2.8, Exhibit 3.10 - 3.12.
12 Exhibit 3.10 - 3.12.
13 Exhibit 3.13.
14 Exhibit 3.4.
15 Exhibit 4.1.
16 Division Exhibit 6.
17 Exhibit 4.1; Exhibit 6.0 - 6.1.

$5,578 still exceeded the income limit for a household of five of $5,045 and upheld the denial of his application for child care assistance. Mr. H requested a hearing.[18]

A telephonic hearing was held on November 8 and 10, 2016. Mr. H represented himself. Sally Dial represented the division.

III. Discussion

The division found that Mr. H's family was not eligible for child care assistance based on the family's income, and Mr. H contests this finding. The outcome of this case depends on whether the division correctly attributed $1,991.55 a month in self-employment income to Mr. H.

Under 7 AAC 41.325(a)(1), a family's monthly income for purposes of the child care assistance program includes earned income, unearned income, and self-employment income. The division must calculate self-employment income under 7 AAC 41.325(a)(1)(B) as:

> (B) the greater of
> (i) the self-employment income of each parent, determined in accordance with 7 AAC 45.445 and 7 AAC 45.450; or
> (ii) if the time engaged in a self-employment activity exceeds three months, the amount equal to the number of hours in the parent's proposed work schedule attributable to the self-employment activity, multiplied by the minimum wage established under AS 23.10.065; if the parent engages in a self-employment activity that is substantially different from the original activity, an additional three-month period is allowed before minimum wage is calculated[.]

Mr. H had no self-employment income during June, July, or August. He had business expenses during those months. However, because his income was zero, there was nothing against which those expenses could be deducted. The division correctly calculated Mr. H's actual adjusted self-employment income at zero.

A. Attribution of Self-Employment Income

Because Mr. H reported no actual self-employment income, the division attributed self-employment income under 7 AAC 41.325(a)(1)(B)(ii), multiplying the number of hours Mr. H reported working in his business by the minimum wage. At the hearing, the division explained that if a client goes for three months of self-employment without making any money, or without making income that exceeds the minimum wage, the division will apply the minimum wage calculation because that person could go out and get a minimum wage job to provide for the person's family. The policy reason for the

[18] Exhibit 5.

regulation is to encourage self-employed persons without income to explore alternate lines of work.[19]

At the hearing, Mr. H emphasized the fact that he was bound by an agreement not to compete with his former employer. Mr. H's self-employment activity after the expiration of the agreement not to compete with his former employer was substantially different from his self-employment activity when the agreement was in effect. While the agreement was in effect, Mr. H was performing what he described as "odd jobs" – helping a friend with a construction project, and cleaning his church. He was engaged in the investing business, but because he was not able to actively solicit business, he had only one client's money under management, a total of $1,400. That client had sought out his services. He charged her one percent of the assets under management, or $14 for the year.[20] While bound by the agreement not to compete, he made much more money cleaning the church for an hour a week at $12 an hour than he did for managing his one client's funds over the course of a year.[21] During the period when the agreement not to compete with Wells Fargo was in effect, Mr. H's self-employment activity and income were negligible.

Although Mr. H engaged in the business of financial services before the expiration of the agreement not to compete, it was at a very minimal level. His self-employment activity in the field changed substantially after the expiration of the agreement not to compete. The agreement not to complete expired in early June 2016.[22] In July, he opened his financial services office, renting office space and establishing regular business hours of 9 a.m. to 6 p.m. He went from having one client and no office space to having an office, keeping regular hours, and actively marketing his services. He now has more assets under management.[23] Mr. H's self-employment activity in the financial services business after he rented office space and began actively marketing his business was significantly different than when he was bound by the agreement not to compete.

It is questionable whether Mr. H was engaged in self-employment activity before July, 2016, given that he had no self-employment income or expenses in June 2016 and was operating under the agreement not to compete. It is clear that his self-employment activity beginning in

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[19] Testimony of Dial.

[20] Testimony of H.

[21] Exhibit 2.11, 3.3.

[22] Mr. H left his job at the No Name Business on June 10, 2015. Exhibit 5.1. The agreement not to compete lasted for one year. Testimony of H.

[23] Testimony of H.

July 2016 was substantially different than any self-employment activity before July 2016. Therefore, when Mr. H applied for child care assistance on August 5, 2016, taking July as the first full month he was fully engaged in the financial services business, Mr. H should have been allowed three months to pursue this substantially different level of self-employment activity for a three month period (July through September 2016) before income based on minimum wage under 7 AAC 41.325(a)(1)(B)(ii) was attributed to him. The division's failure to apply the three month provision is understandable, as it seems the underlying fact of the agreement not to compete and its effect on Mr. H's self-employment may not have been fully explained until the hearing.

Excluding the $1,991.55 in self-employment attributed to Mr. H, the family's monthly gross income at the time Mr. H applied for child care assistance was below the gross income limit for a household size of five.[24]

B. Deductions

At the hearing, Mr. H argued that the division should have taken his household's expenses, such as utilities and mortgage expenses, into account in determining eligibility for the child care assistance program. However, this is not permitted under the program regulations. The only deductions allowed from a family's overall monthly income under the program are payments for child support and catastrophic medical or dental costs.[25] The division correctly deducted Mr. H's child support obligation of $43 a month.[26] Mr. H was not entitled to any other deductions from monthly income.

C. Calculation of Self-Employment Income and Overtime

Mr. H also challenged the division's attribution of income at an overtime rate.[27] This issue does not affect the first three months of self-employment activity, but may affect subsequent months if Mr. H's actual self-employment income does not exceed attributed self-employment income under 7 AAC 41.325(a)(1)(B).

The division simply took the hours Mr. H reported, and multiplied the number of hours over 40 by the overtime rate. At the hearing, Mr. H explained why he reported working more than 40 hours a week. He testified that the overtime he reported was actually time he spent at home early in the morning watching CNBC to check the financial markets. Although he

[24] Exhibit 6.1, Exhibit 9.
[25] 7 AAC 41.325(a)(3).
[26] Exhibit 3.6, 3.16.
[27] Exhibit 5.1.

considers this work, he also stated that "my client and money producing hours are nine to six." For purposes of the child care assistance program, the time Mr. H spends at home in the morning checking markets may be work, but it does not appear to be a time when his family requires day care.

Mr. H clearly took pains to fill out the application form as accurately as he could. Furthermore, the division's calculation of attributable income including the overtime hours is understandable, given the information Mr. H provided. But it does not appear that Mr. H needs child care for the period when he is at home checking the markets, particularly since his wife is not employed outside the home during those early morning hours.[28] Under the circumstances, the correct number of hours to use in calculating attributable self-employment income would be 40 hours per week, not 45.

IV. Conclusion

Mr. H's self-employment activity when he was under the agreement not to compete with his former employer differed substantially from his self-employment activity after that agreement expired. The division did not account for this when it denied his application. The division should allow Mr. H three months (July through September 2016) before attributing income based on minimum wage under 7 AAC 41.325(a)(1)(B)(ii). The division should recalculate Mr. H's income and eligibility for benefits in light of this conclusion. If the division attributes self-employment income to Mr. H for October 2016 or subsequent months, it should be based on a 40 hour work week.

The division's decision to deny Mr. H's application for child care assistance is reversed.

DATED: November 25, 2016.

Signed
Kathryn L. Kurtz
Administrative Law Judge

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

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28 Exhibit 2.11.