

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

IN THE MATTER OF)	OAH No. 05-0426-CSS
M J. Y)	CSSD No. 001106536
)	
_____)	

ORDER OF DISMISSAL

I. Introduction

On May 27, 2005, the Child Support Services Division (Division) filed a Motion for Dismissal in this appeal. The parties were given until June 23, 2005, to respond. M J. Y, the obligor in this case filed an opposition to the Division’s motion through his attorney, A B, on June 23, 2005. E B. Z, the custodial grandparent, did not respond to the motion. The Division had until July 5, 2005, to respond to Mr. Y’s opposition. The Division did not respond. The motion is granted.

II. Facts

The motion seeks to dismiss Mr. Y’s late appeal of the Division’s Administrative Child and Medical Support Order issued November 24, 2004.¹ This order established Mr. Y’s support obligation for his child, X.² The order set ongoing child support at \$229 per month and established arrears going back to April of 2001.³

The Division argues that Mr. Y’s appeal should be dismissed because he failed to file his request for an Administrative Review within 30 days of the date of issuance of the Administrative Child and Medical Support Order as required by 15 AAC 125.118(a).

The Administrative Child and Medical Support Order was served on Mr. Y on November 24, 2004.⁴ Mr. Y’s deadline for filing a request for an Administrative Review to appeal the Administrative Child and Medical Support Order was December 24, 2004.⁵ Mr. Y’s request for an Administrative Review to appeal the Administrative Child and Medical Support Order was dated April 27, 2005.⁶

¹ Ex. 5.

² Ex. 5.

³ Ex. 5.

⁴ Ex. 5.

⁵ See 15 AAC 125.118(a) and discussion below, explaining why the 30-day deadline will not be waived.

⁶ Ex. 6.

Mr. Y explained circumstances surrounding his failure to timely file his appeal as follows:

On March 8, 2005, Mr. Y received a Notice of Withholding. See Notice of Withholding attached as Exhibit A. In response on March 22, 2005, through counsel Mr. Y filed a timely challenge in part because the child was conceived as a result of a sexual assault perpetrated upon him when he was only blank years old, which was a crime under A.S. 11.41.436(a)(1). Id. CSSD cannot establish paternity and child support obligations in cases of sexual assault. See A.S. 25.27.040(b).

Unbeknownst to counsel, on March 24, 2005, CSSD issued an administrative decision on March 24, 2005, rejecting Mr. Y's challenge and directing him to request a formal hearing on the sexual abuse issue. See Administrative Review Decision on Income Withholding attached as Exhibit B. CSSD did not send this decision to counsel, but only to Mr. Y. Thus, counsel missed the 30-day deadline to request the formal hearing. However, upon counsel's receipt of the March 24 decision via her client's delivery, a request for formal hearing was made immediately on April 27, 2005, and was only three days late.

Furthermore, in the interest of justice, the court must hear Mr. Y's challenge. Mr. Y is now only blank years old. *Affidavit* of A B, paragraph 3 attached as Exhibit C. He is a traditional Yupik Eskimo who has spent a majority of his life in a village. Id. He has less than a seventh-grade education and has a very low capacity. Id. CSSD was aware that Mr. Y's was of a very low capacity and unable to understand and address the legal documents they sent him. See letter to CSSD dated September 29, 2004, attached as Exhibit D. In that letter, Mr. Y requested that all correspondence be forwarded to his representative as he could not understand the nature of the proceedings against him. See id.⁷

III. Discussion

A. Mr. Y's Appeal Was Over Four Months Late

Mr. Y's opposition to the Division's motion indicates some confusion about the administrative appeals process in his case. Mr. Y appears to believe that the Division is asking to dismiss his request for a formal hearing regarding his withholding order because it was a few days late.⁸ Mr. Y would not be entitled to a formal hearing regarding his withholding order.⁹ It does not matter that Mr. Y filed a request for an additional administrative appeal of his withholding order a few more than thirty days after the administrative review order was issued. There is no thirty-day deadline for filing an administrative appeal of that order. It is simply not allowed. Mr. Y had already exhausted his administrative remedies to contest the withholding order.

There were, however, other orders that the Division issued in this case, which established

⁷ Mr. Y's Opposition to CSSD's Motion to Dismiss, Pages 1 & 2.

⁸ Mr. Y's Opposition to CSSD's Motion to Dismiss.

⁹ *See* 15 AAC 125.510(d). The child support regulations do not allow an administrative appeal of an administrative review decision on an appeal of a withholding order. Mr. Y must go directly to court to challenge the enforcement action.

Mr. Y's paternity and child support. These orders could have been subject to further administrative appeals, but Mr. Y missed the appeal deadlines for these orders by much more than a few days.

The closest Mr. Y got to a timely appeal of an order for which a formal hearing may be requested was his appeal of the Administrative Child and Medical Support Order, which was more than four months late.

An Administrative Child and Medical Support Order is a Notice and Finding of Financial Responsibility under Alaska child support statute AS 25.27.160. Mr. Y's order explains this and explains that a request for an administrative review of the order must be postmarked or received within 30 days from the date the person filing the request received the order.¹⁰ The form provided to Mr. Y to file a request for an administrative review also contains this warning.¹¹ This form was included with the Administrative Child and Medical Support Order when it was sent to Mr. Y.¹²

Alaska Regulations 15 AAC 125.118(a) provides:

(a) A person served with a notice and finding of financial responsibility or with a copy of a notice and finding of financial responsibility setting a support obligation may request an administrative review of the notice and finding. The person making the request shall make it in writing, and shall send the request to the agency by certified mail, return receipt requested. The request must be postmarked or received by the agency within 30 days after service of the notice and finding of financial responsibility. The request must state the specific reasons for the request for administrative review and be accompanied by the documentation upon which the person requesting the administrative review intends to rely. When a request for administrative review does not fully comply with the requirements of this subsection, the agency will, in its discretion, accept a request for administrative review that substantially complies with the requirements of this subsection.

In his opposition to the motion to dismiss, Mr. Y asserts that his request for a formal appeal was only three days late. Mr. Y incorrectly argues that the date he received his notice of withholding, March 24, 2004, rather than the date he was sent the Administrative Child and Medical Support Order, November 24, 2004, was the date that started the thirty day deadline running for a request for a formal hearing. An administrative review must be conducted before

¹⁰ Ex. 5, page 1.

¹¹ Ex. 5, page 8.

¹² Ex. 1, page 6.

an obligor is entitled to a formal hearing.¹³ Mr. Y missed the deadline for requesting an administrative review. He missed the deadline by more than four months.

B. Division Did Not Waive Deadline

The Division did not waive the deadline for Mr. Y's untimely request for administrative review based on a finding that his appeal substantially complied with the requirements for filing an appeal, as allowed by the last sentence of 15 AAC 125.118(a). The Division's administrative review decision regarding his withholding order merely suggested that he could also attempt to raise the issue of sexual abuse through a late administrative appeal of either the administrative paternity order or the Administrative Child and Medical Support Order. However, as an administrative appeal of either would be untimely, Mr. Y would have to show that the administrative appealed deadline should be waived if either of the other parties filed a motion to dismiss. The Division has filed such a motion.¹⁴

C. Appeal Deadline Can Only Be Waived To Avoid Injustice

Mr. Y argues that I should waive the deadline. I may or may not have the authority to waive this deadline.¹⁵ Even assuming that I do have the authority under 15 AAC 05.030(k), however, the deadline may be waived under that regulation only if strict adherence to the deadline works an injustice.¹⁶

D. Victim of Crime of Sexual Abuse of a Minor has Duty of Support

Alaska Statute 25.27.040(b)(1) provides:

(b) The agency may not attempt to establish paternity in any case (1) involving incest or forcible rape, unless the mother of the child is legally competent and requests the establishment of paternity; in this paragraph, "forcible rape" means sexual assault in the first degree under AS 11.41.410 or a conviction under a law or ordinance from another jurisdiction with similar elements; "forcible rape" includes adjudications of delinquency for acts with elements similar to AS 11.41.410.

The Division's authority to establish paternity and child support when the child is conceived as the result of certain sex crimes is limited.¹⁷ However, this limitation of the Division's authority is itself limited to crimes of incest and forcible rape. In Alaska, the crime of forcible rape is Sexual

¹³ 15 AAC 125.118

¹⁴ Division's Pre Hearing Brief, page 1.

¹⁵ See 15 AAC 05.030(k). It is not clear that the hearing officer has the authority to waive the deadline in 15 AAC 125.118(a) under the waiver authority of the general hearing procedure regulations in 15 AAC 05.

¹⁶ 15 AAC 05.030(k).

¹⁷ AS 25.27.040(b).

Assault in the First Degree, AS 11.41.410. An element of AS 11.41.410 is that violence, or the threat of violence, was used to coerce the victim.¹⁸ The Division’s authority to establish paternity is not limited in cases where the child is conceived as the result of the crime of sexual abuse of a minor, where the victim was below the age of consent, but was not coerced with threats.

Mr. Y asserts that the child in this case was conceived as the result of Mr. Y being a victim of a violation of AS 11.41.436(a)(1), Sexual Abuse of a Minor in the Second Degree. This crime is not listed in AS 25.27.040(b), the statute cited by Mr. Y, which limits the Division’s authority to establish paternity in cases of “incest or forcible rape.” Sexual Assault in the First Degree, AS 11.41.410, is listed in that statute.

The crime of Sexual Abuse of a Minor in the Second Degree, AS 11.41.436(a)(1), could be fairly characterized as what is commonly called statutory rape, as oppose to forcible rape. The Alaska legislature did not relieve the Division of its duty to establish child support order in cases of statutory rape.

Male statutory rape victims cannot use AS 25.27.040(b) as a shield to prevent the Division from establishing a paternity or child support for their biological children. The language of AS 25.27.040(b) and the limits of biology work in effect to give only female victims of forcible rape or incest the right to prevent the Division from establishing that the perpetrator is the father of her child. Female victims can waive this right, but they cannot prevent the Division from establishing a child support order against them if their child is in the custody of the father or a third party.

AS 25.27.040(b) does not cover Mr. Y’s situation, or relieve the Division of its duty to establish child support orders for Everett and collect support from both his mother and his father, Mr. Y, while the child is in the custody of his grandmother.

E. Enforcing Deadline against Adult with Low Capacity

It could work an injustice to enforce an administrative appeal deadline against an adult with low capacity if the individual was unable to timely appeal due to his low capacity and the underling merits of his appeal indicate that he was entitled to relief. Neither of these considerations applies in Mr. Y’s case.

1. No Showing that Low Capacity Caused Late Appeal

Mr. Y’s admits that he has a seventh grade education. He asserts that he has “very low capacity” and is unable to understand the documents sent to him by the Division. Mr. Y was,

¹⁸ AS 11.41.470(a).

however, able to timely respond to the Notice of Paternity and Financial Responsibility sent to him by the Division and request genetic testing.¹⁹ He was able to follow instructions to participate in genetic testing.²⁰ He failed to timely file an appeal of the order establishing paternity or the Administrative Child and Medical Support Order sent to him after the genetic test results showed that he was C's father.²¹ However, Mr. Y was able to obtain legal representation in time to file a timely appeal of the withholding order.²² In short, it appears that Mr. Y is capable of timely responding to the orders and notices that the Division has sent to him or obtaining the assistance he needs, but he failed to do so when he was sent the order establishing paternity and the Administrative Child and Medical Support Order.

2. Grounds for Appeal Lack Merit

AS 25.27.040(b) is intended to prevent the establishment of paternity to protect the victims of forcible rape and incest and children that were conceived as a result. If Mr. Y's case had been one of those covered by AS 25.27.040(b), that statute should have been used to prevent genetic testing. The time to oppose the establishment of a child support order in this case based on the issues now raised by Mr. Y, was when the Division first attempted to establish paternity. Once paternity has been established it does the child no good and significant harm to prevent the collection of child support. Furthermore the purpose of AS 25.27.040(b), is to allow a victim an opportunity to prevent having the perpetrator established as the father of her child, not to prevent her from having to pay child support to a third party custodian. Waiting until after a withholding order issued to invoke AS 25.27.040(b) defeats the purpose of that statute.

F. Late Appeal Would Have Effect of Retroactive Modification

Allowing a late appeal for administrative ongoing child support in this case would also run counter to the spirit of the prohibition on granting retroactive modifications.²³ Child support orders cannot be modified retroactively. Child support going back to 2001 was set in this case in an administrative order. The order was in effect for five months before it was appealed. Resetting child support at a formal hearing would have the effect of retroactively adjusting many months of child support. This does not mean that late appeals of child support amounts should never be allowed, but it is an additional factor to consider when determining whether it is necessary to waive

¹⁹ Ex. 2.

²⁰ Ex. 3.

²¹ Ex. 4 & 5.

²² Ex. 6.

the appeal deadline to avoid injustice in this type of case.

Dismissing the appeal as untimely may require Mr. Y to live with the amounts set in the order, but the amounts set in the order are very low. For the first years, 2001, 2002, and 2003, the monthly amount is set at the minimum, \$50. For 2004, 2005 and ongoing, the monthly amount is only \$229, per month. This amount was set based on Alaska minimum wage earnings. If Mr. Y's earning capacity is presently lower than this, he can receive prospective relief by requesting a modification of his ongoing child support.

IV. Conclusion

Mr. Y was not entitled an administrative review to appeal the Administrative Child and Medical Support Order because he did not comply with the requirements for requesting an administrative review.²⁴ Mr. Y has not shown that this deadline should be waived in his case. If Mr. Y wished to appeal his child support order, he could have requested an administrative review within 30 days after he received the order.²⁵ Instead he waited more than four months after his appeal deadline to request administrative review. It will not work an injustice if this deadline is strictly enforced in this case. It would not be appropriate to waive this deadline.

V. Child Support Order

1. Division's Motion to Dismiss is Granted.
2. The Administrative Child and Medical Support Order issued on November 24, 2004 is Affirmed.
3. The order Establishing Paternity issued November 16, 2004 is Affirmed.
4. Mr. Y's request for a formal hearing to appeal the Administrative Review Decision on Income Withholding issued on March 24, 2005 is Dismissed.
5. This case will not be scheduled for an administrative review or a formal hearing.

DATED this 11th day of October, 2005.

By: Signed _____
Mark T. Handley
Administrative Law Judge

²³ Alaska Civil Rule 90.3(h).

²⁴ See 15 AAC 05.010 & 15 AAC 05.030. See also *Maywald v. State, Dept. of Revenue*, No. 3AN-95-375 Ci. (Alaska Super., October 31, 1995) at 4 - 5.

²⁵ 15 AAC 05.010(b)(6) & 15 AAC 125.118(a).

Adoption

I Tom Boutin, on behalf of the Commissioner of Revenue, order that this decision and proposed child support order concerning the child support obligation of M J. Y be adopted as of this date and entered in his file as the final administrative determination in this appeal.

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

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of the written decision of the hearing officer, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and, if mailed, be addressed: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days of the date of this decision.

DATED this 11th day of October, 2005.

By: Signed
Tom Boutin

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