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

In the Matter of	)	
G W. M	)	OAH No. 05-0768-CSS
	)	CSSD No. 001067948

CHILD SUPPORT DECISION & ORDER

I. Introduction

G W. M requested a hearing on the Child Support Services Division's September 20, 2005 Notice of Adjustment concerning support for his children, X and Y. The division moved to dismiss. A telephonic hearing on the motion was held on October 31, 2005. Mr. M and his attorney, Peter F. Mysing, the custodian, S S, and the division's representative, David Peltier, participated by telephone. The division's motion is granted because the relief Mr. M seeks is not available in this administrative appeal.

II. Facts

Mr. M and Ms. S have two minor children, X and Y, who were born in the early 1990s.[1] After she and Mr. M separated in the late 1990s, Ms. S initiated an administrative child support action against him through the division.[2] On November 12, 1999, the division issued an order setting Mr. M's ongoing child support at $736 per month beginning December 1, 1999, and establishing arrears of $17,045 for the period October 1, 1997 through November 30, 1999.[3]

By notarized letter dated September 28, 2001, Mr. M agreed to pay Ms. S a lump sum of $10,000 "for past child support" and to pay $500 per month in child support beginning November 2001.[4] In return, Ms. S was

> to cancel all services with the Child Support Enforcement Division. She [was] to report that all back child support is paid in full. In the event [Mr. M did] not pay [his] monthly child support beginning in November of 2001, S [S] can turn [him] into the child support Enforcement Division at that time.[5]

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1 August 17, 2005 Affidavit of G W. M ("M Aff.") at ¶ 1 (submitted as part of the Division's Exhibit 4, pp. 3-4); also August 22, 2005 Notice of Errata (correcting T's date of birth as misstated in the original affidavit).

2 M Aff. at ¶ 2.

3 November 12, 1999 Administrative Review Decision on Notice and Finding of Financial Responsibility (attached as the Division's Exhibit 4, p. 5); also M Aff. at ¶ 2.

4 Division's Exhibit 4, p. 6; also Matthew Aff. at ¶ 3.

5 Division's Exhibit 4, p. 6.

Ms. S testified that she and Mr. M had so agreed but emphasized that if Mr. M did not comply with the agreement, she "could turn him back in" to the division.[6] She further testified that Mr. M has made no child support payments under the agreement since October 2003.

On July 15, 2005, Ms. S applied to the division for services.[7] Ten days later, the division sent Mr. M a Letter of Introduction directing him to begin making the $736 monthly payments under the 1999 order through the division.[8] The Letter of Introduction also invited Mr. M to provide proof of payments previously made and information, if any, about "times after the order was established when [he] lived with the custodial parent or had custody of the children."[9] It also gave notice that "[e]ither party may request a review of the support order [and that t]he order may be modified if: 1) support calculated under the child support guidelines is more than 15 percent greater or less than your support order [or] 2) there has been a significant amendment to the guidelines that is relevant to your situation …."[10]

On August 17, 2005, through his counsel, Mr. M filed a request for administrative review, asking that "an Administrative Review Hearing be set" in the case.[11] With that request, Mr. M submitted an affidavit. In addition to describing the agreement for lump sum payment of arrears and reduced monthly support payments, the affidavit states that Mr. M has had physical custody of X since January 17, 2003, that the family had reconciled in March 2003, separating again on October 31, 2004, and that Y lives with Ms. S only when attending school.[12] The affidavit also states that Mr. M does not object to the division "calculating child support for the period November 1, 2004, to the present" and asserts that this is the only period for which support is owed, and that support for this period must be calculated based on divided custody.[13]

At the motion hearing, Ms. S did not dispute Mr. M's representation that the physical custody arrangement had changed. She also admitted that she had visited Mr. M between October 2003 and October 2004. But she disputed whether this qualifies as a "reconciliation"

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6 Recording of October 31, 2005 Hearing. Unless otherwise indicated, all references in this decision to testimony of the parties is to the oral testimony at the October 31st hearing on the motion.

7 Division's Exhibit 2 (Application for Child Support Services dated 6/4/05, receive stamped by the division on July 15, 2005).

8 Division's Exhibit 3, pp. 1-2.

9 Id.

10 Id.

11 Division's Exhibit 4, p. 1.

12 M Aff. at ¶¶ 5-6.

13 M Aff. at ¶¶ 7-8.

because she maintained her separate home during the period. She added that she does not believe Mr. M owes her in excess of $50,000 in child support.

The division issued its Administrative Review Decision on Income Withholding on September 15, 2005.[14] The decision concluded that "the amount owed as stated in the Income Withholding Order is incorrect" and indicated that "the arrears will be adjusted for the direct payments Ms. S received and disclosed to [the division] including a lump sum payment of $10,000.00 paid in October 2001."[15]

Apparently on September 20, 2005, the division issued a Notice of Adjustment. Though no such notice was submitted with the record on appeal, the hearing-request letter from Mr. M's counsel describes such a notice, stating that it set Mr. M's arrears at $50,334.32.[16] Mr. M requested a formal hearing in response to that notice, arguing that the division had failed to "honor the parties' agreement to reduce child support" and had not acknowledged the alleged period of reconciliation or change in physical custody.[17]

On October 6, 2005, the division moved to dismiss, arguing that it "has not taken an administrative action warranting an appeal." By notice dated October 10, 2005, a hearing on the motion was scheduled. The notice asked the division to be prepared to elaborate on why it apparently believed Mr. M's appeal to be premature. The notice asked that any party who opposed the motion be prepared to identify the issues that party believes require a hearing.

During the October 31, 2005 motion hearing, the division clarified the basis for its motion. The division explained that the November 1999 order is the only one in existence, that the parents have not sought to modify it, and that the division cannot adjust its collection efforts to address whether an arrears debt in excess of $50,000 is too high without cooperation from Ms. S.[18] As a result, it became clear that the division's motion was not predicated on this being a premature appeal, as first appeared from the motion, but rather on the unavailability of an administrative appeal of the division's collection efforts.

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[14] See Mr. M's first post-hearing submittal filed November 2, 2005. The referenced withholding order was not submitted by the parties to the record for this appeal.

[15] Id. In addition to the $10,000 lump sum payment, the record submitted by the parties shows several $500 or $250 checks issued by Mr. M to Ms. S, primarily in 2001, 2002 and 2003.

[16] Division's Exhibit 1, p. 1 (September 30, 2005 hearing request letter).

[17] Id.

[18] The division had sent Ms. S a Notice of Request for Suspension of Ongoing Support on October 4, 2005. See Division's Exhibit 5. The notice was designed to elicit from Ms. S her agreement (or lack of agreement) with Mr. M's affidavit assertions about the physical custody arrangement and now-disputed reconciliation period.

Mr. M, through counsel, maintained the position that this is the proper forum in which to raise issues about the enforcement of the agreement to reduce his child support obligation but explained research would be needed to provide specific legal authority for that position. The record was held open to allow Mr. M to submit a brief and legal authority on whether the Revenue Commissioner,[19] though an administrative appeal such as this, can require the division to give effect to such an agreement, instead of enforcing the existing, unmodified administrative support order.

III. Discussion

Mr. M's request for a formal hearing on the Notice of Adjustment raises a threshold legal question: does a parent have a right to a department-level administrative appeal of a collection action taken by the division? The simple answer is "no." Moreover, the fact that Mr. M seeks to enforce an agreement with Ms. S and that the physical custody arrangement has changed do not create an appeal right where none exists.

By statute, an obligor parent is entitled to a formal hearing if he or she requests one within 30 days after being served with a notice and finding of financial responsibility.[20] By regulation, the Department of Revenue has provided a formal hearing opportunity for parties disappointed by an administrative review decision on a notice and finding of financial responsibility.[21] Thus, when Mr. M was served with such a notice in connection with the original child support order issued in 1999, he would have been entitled to a formal hearing if he had first requested an administrative review and had been disappointed by the result.

Also by statute, a parent who seeks to have his or her child support obligation modified due to a change in circumstances may be entitled to a hearing on the modification petition.[22] By regulation, the Department of Revenue has provided a formal hearing opportunity for parties disappointed with the result of a modification review.[23] Thus, if Mr. M had petitioned for a modification of the 1999 order, to address the change in physical custody or other changed

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[19] Insofar as department-level administrative appeals of Child Support Services Division decisions are available, they are appeals to the Commissioner of the Department of Revenue, or the commisisoner's designee. By statute, the Office of Administrative Hearings hears such appeals on the commissioner's behalf and prepares proposed decisions for the commissioner's consideration. See AS 44.64.030(a)(19); AS 44.64.060(b)&(e).

[20] AS 25.27.170(a).

[21] See 15 AAC 125.118(f).

[22] AS 25.27.190.

[23] See 15 AAC 125.321(c).

circumstances, he (or Ms. S) might have been entitled to a formal hearing on the modification petition at the Revenue Commissioner level.

When, as here, however, a parent wants to dispute the division's efforts to collect past due and ongoing support under an existing order that has not been modified, the parties' legal remedies are through the courts, not through an administrative appeal to the Revenue Commissioner.[24] The Department of Revenue has not created a formal hearing right for parties who wish to challenge the division's child support collection efforts. The department's regulations do afford parties such as Mr. M, who have received the Letter of Introduction, giving notice of the initiation (or in this case re-initiation) of enforcement actions, an opportunity to contest the letter/notice, including the arrears amount.[25] Mr. M availed himself of that opportunity by filing his August 17, 2005 Request for Administrative Review of Notice of Withholding and Enforcement of Health Care Withholding. The regulation that gave Mr. M the right to request such an administrative review does not provide for an appeal to the Revenue Commission from the resulting decision.[26] Many of the division's administrative review decisions can be appeal through a formal hearing request, but the withholding notice that triggered Mr. M's request for an administrative review is not among them.[27] By necessary extension, a Notice of Adjustment of such a withholding notice is not among the division actions that can be appeal to the Revenue Commissioner.

In his post-hearing brief, Mr. M made two arguments, neither of which addresses whether an appeal such as this to the Revenue Commissioner is available under these circumstances. The record was held open to allow Mr. M to submit legal authority and argument on whether the Revenue Commission can require the division to give effect to an agreement, instead of the existing, unmodified administrative support order. Instead, of addressing that issue squarely, Mr. M argued defenses suited to a collection action before a court.

Mr. M first argued that the prohibition against retroactive modifications should not apply because "there was no operant CSSD child support order" during the period when "the parties

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[24] See AS 25.27.226 (providing for the obligee, though the custodian or the division, to see a judgment from the court and allowing for a hearing in that context); AS 25.27.227 (preserving the parties' other remedies as additional to the right to reduce a support obligation to a judgment).

[25] 15 AAC 125.405(c).

[26] See generally 15 AAC 125.405. A request for formal hearing is available for some administrative review decisions.

[27] See 15 AAC 05.025 (listing numerous types of administrative review decisions considered final "for purposes of appeal to a formal hearing" but not including the administrative review decision authorized under 15 AAC 125.405).

were administrating child support among themselves…." He offered no legal authority for the proposition that the 1999 order was not "operant" during the period in which Ms. S had withdrawn from services and the parties arguably were adhering to the agreement for reduced payments. Furthermore, his argument overlooks the fact that the prohibition against retroactive modifications is entirely irrelevant in a case, such as his, in which no modification has been requested.

The thrust of Mr. M's first argument seems to be that the Revenue Commissioner can order the division to treat the 1999 order as if it did not exist, so as to give effect to the parties' agreement for the $10,000 lump sum and $500 per month reduced child support. He asserts essentially that though the courts must scrutinize agreements to waive support otherwise required under Civil Rule 90.3, the Department of Revenue can give effect to any such agreement (no matter the effect on the obligee children) by creating the fiction that an existing administrative order has no effect if the custodian is not rigorously enforcing it. Once again, however, Mr. M failed to cite any legal authority for the very dubious proposition that the Revenue Commissioner can nullify an administrative order meant to provide support to minor children whenever the custodian discontinues using the division's services to enforce the order.

This is not to say that Mr. M can never raise enforceability of the agreement as a possible defense to collection of the full amount of arrears. Whether he could prove to the satisfaction of a court that a waiver, or accord and satisfaction, has occurred based on Mr. M's September 28, 2001 letter and the parties' actions, remains to be seen. The law does recognize that support might be waived through an agreement signed by both the obligor and the person acting for the obligee.[28] But the law does not give Mr. M the right to seek enforcement of the agreement through an administrative appeal to the Revenue Commissioner.

For his second argument, Mr. M asserted that the division is precluded from collecting arrears attributable to support for X from January 2003 and onward because of the preclusion defense in Civil Rule 90.3. Under that defense, a parent may be precluded from collecting arrears that accumulate when that parent acquiesces in a change of physical custody for more than nine months.[29] Thus, Mr. M might be able to assert this defense in a collection action before a court. The possibility of a preclusion defense, however, does not give rise to a right to a formal hearing at the department level on the underlying collection matters.

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[28] AS 25.27.065(a). The September 28, 2001 letter was signed only by Mr. M.

IV. Conclusion

The division is correct that Mr. M's attempt to appeal the Notice of Adjustment should be dismissed. The remedies Mr. M seeks may be available through the courts, but they are not available though an administrative appeal to the Revenue Commissioner and thus the Office of Administrative Hearings is without jurisdiction to hear such an appeal on behalf of the Commissioner. Nothing in this decision precludes Mr. M from seeking a modification of the support order based on the change in physical custody or other reasons that might warrant modification.

V. Order

It is ordered that the division's motion to dismiss is GRANTED.

DATED this 24th day of February, 2006.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

[29] Alaska R. Civ. P. 90.3(h)(3).

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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of March, 2006.

By: *Signed*
Signature
Terry L. Thurbon
Name
Chief Administrative Law Judge
Title

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