

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

In the matter of:)	
)	OAH No. 06-0405-CSS
D. L. G.)	CSSD NO. 001010034
_____)	

DECISION AND ORDER

I. Introduction

D. L. G. appealed two minor aspects of an Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on May 1, 2006, after CSSD had granted his Motion to Vacate Default Order. The obligee child is S., born 00/00/83 and now emancipated. S. K. W. had primary physical custody of S. while he was growing up.

Mr. G. participated by telephone in the formal hearing, held on June 29, 2006. A.J. Rawls, Child Support Specialist, appeared for CSSD. Ms. W. did not participate and could not be reached by telephone. The hearing was recorded. After the hearing, the record was reopened until July 7 to permit Mr. Rawls to submit a missing page of Exhibit 18, the agency decision under appeal.

II. Facts

Mr. G.'s child support obligation for S. dates back to 1988. He seems to have paid a minimum support amount of \$40 per month for a number of years. Effective June 1, 1994, in response to a petition for modification from Ms. W., his support amount was raised to \$454 per month.¹ Since Mr. G. had refused to provide actual income information, the basis for the new support figure was the average income for an Alaska male of Mr. G.'s age at that time.²

Mr. G. appealed the new support amount to Hearing Examiner Diane Colvin. Ms. Colvin affirmed the division's order. In doing so, she first noted that Mr. G. claimed to have no income,

¹ Exhibit 2 (Informal Conference Decision on Modification, February 4, 1995).

² Exhibit 3, p. 1 (Child Support Decision, August 15, 1996, finding of fact no. 2).

and made a finding that his claim was “not credible.”³ She reviewed evidence that he indeed had substantial income. She then observed that, in any event, even if he had no income, “he must be voluntarily unemployed or underemployed.”⁴ After making these two alternative findings, she determined that average statistical income was a reasonable amount to assign to Mr. G. for purposes of calculating support.⁵

Mr. G. paid some of the child support he owed under the new order, but quickly built up a substantial arrearage.⁶ On August 17, 2005, he filed a Motion to Vacate Default Order using CSSD form 04-1907A.⁷ The motion asked that his support from 1994 through the child’s emancipation in 2001 be recalculated using actual income figures rather than the statistical figures, attaching Child Support Guidelines Affidavits and copies of tax returns that he had filed (many of the returns were filed years after they were due, in an apparent effort by Mr. G. to put his financial affairs in better order). Ms. W. submitted a letter opposing the motion.⁸

On November 17, 2005, CSSD issued to Ms. W. a confusing and contradictory order, stating: “The Request for Relief of a Default Administrative Child Support Order is denied because: YOUR REQUEST TO DENY THE MOTION TO VACATE DEFAULT ARREARS IS DENIED.”⁹ On May 1, 2006, the division issued an Administrative Review Decision making it clear that the intent of the November order was actually to grant Mr. G.’s request for relief,¹⁰ along with an order vacating the \$454 per month support order under the authority of Alaska Statute 25.27.195.¹¹ CSSD issued a new Administrative Child Support and Medical Support Order setting support at varying amounts between \$169 and \$453 monthly from June 1, 1994 through S.’s 19th birthday on 00/00/02, with a short period of suspension during part of 2001 when S. was not enrolled in an accredited educational program.¹²

³ Exhibit 3, p. 3.

⁴ *Id.*

⁵ *Id.*

⁶ Exhibit 18, pp. 15-20.

⁷ Exhibit 4.

⁸ Exhibit 6.

⁹ Exhibit 7.

¹⁰ Exhibit 16.

¹¹ Exhibit 17.

¹² The support amounts can best be followed at Exhibit 18, pp. 15-20.

Mr. G. filed a timely appeal raising two issues.¹³ First, he disputed the inclusion of permanent fund dividends in his income for calculating child support in 1996-2001, stating that he did not receive PFDs and they are not shown on his tax returns. Second, he submitted a partial copy of an amended 1996 tax return lowering his income in that year by about \$10,000, asking that it be substituted for the unamended return CSSD had used for that year. Ms. W. did not appeal.

Just prior to the hearing, Mr. G. submitted a statement from the Department of Revenue showing that he has received no PFD since 1991.¹⁴ In some years (1998, 2000, 2002, 2003) he applied for the dividend but was denied; in other years he did not apply. The last five dividends he received—1987 to 1991—had been attached by creditors.

At the hearing, Mr. G. declined to take an oath and offered no testimonial evidence. In argument, he said he could not “specifically recall” why his dividends were denied in the years when he applied. Asked why he did not apply in some years, he said, “If I’d applied it would have been denied or granted.” He admitted that in some years he was ineligible because he missed the application deadline. He also said that in some years he believed he was ineligible due to out-of-state travel, but he supplied no evidence as to which years that statement would apply to, nor as to what kind of travel he engaged in.

III. Discussion

A. Authority of CSSD to vacate the prior order

At the hearing, CSSD’s representative contended that the division was beyond its authority when it vacated the prior support order. CSSD asked the administrative law judge to reverse the division and reinstate the prior order. When asked if the appropriate relief would be to remand the matter to the division for it to reconsider its action, the division declined the remand and insisted upon reversal.

It is procedurally unusual for an agency party to seek reversal of its own order when no other party present at the hearing is advocating that course of action. In some cases, this procedure could raise due process concerns, especially where, as here, the other interested parties are given no advance notice that the agency will greatly broaden the issues on appeal and will seek to appeal its own decision.

¹³ Exhibit 19.

¹⁴ Exhibit A.

In this case, it is not necessary to decide whether the remedy CSSD asks for is appropriate at this stage of the proceedings, because CSSD is mistaken in its contention that it acted beyond its authority.

The agency's concern about its authority stems from 15 AAC 125.121. That regulation allows the agency to, in some circumstances, "vacate an administrative support order if the support order was based on a default income figure."¹⁵ A "default income figure" can include one imputed, as Mr. G.'s was, from average annual wages by age group.¹⁶ However, an income figure is not a "default income figure" if it was imputed because of "a finding of voluntary unemployment or underemployment."¹⁷ CSSD is concerned that the prior order in this case was predicated on a finding of unemployment or underemployment, taking it outside the coverage of 15 AAC 125.121.

In this case, however, CSSD's support order in 1995 did not make a finding of voluntary unemployment or underemployment.¹⁸ When Diane Colvin affirmed the order in 1996, moreover, the affirmance was fundamentally based on an express finding that "The Obligor's claims that he has no income are not credible."¹⁹ Although she did later allude to Rule 90.3's provision for imputing income to those who are voluntarily unemployed or underemployed, she did so only as an alternative or backup basis for her decision. At bottom, she did not believe that Mr. G. had no income; she believed that he *did* have substantial income and was not being honest about it. Thus both CSSD and the hearing officer imputed income to Mr. G. based on the lack of exact income data from him, not based on a belief that he did not have the income. This kind of imputation leaves the order within the definition of an order based on a "default income figure" under CSSD's regulations, and the agency does have the authority to revisit it under 15 AAC 125.121.

B. Permanent Fund Dividends

CSSD included a PFD in the income from which it calculated Mr. G.'s revised support obligations in all the years at issue. Mr. G. has shown that he did not receive a PFD in those years, and he questions whether the agency has authority to impute one to him.

¹⁵ 15 AAC 125.121(a).

¹⁶ 15 AAC 125.121(j)(1)(B).

¹⁷ 15 AAC 125.121(j)(2)(C).

¹⁸ Exhibit 2.

¹⁹ Exhibit 3, p. 3.

The authority to impute a PFD comes from 15 AAC 125.050(e), which provides that “[w]hen calculating income under this section [the general section covering how to determine income from all sources], the agency will include in the parent’s estimated total income a . . . permanent fund dividend payable under AS 43.23, *unless the evidence available to the agency indicates that the parent is not eligible* for a permanent fund dividend”²⁰ Therefore, the agency can, and must, impute a PFD if the parent appears to be eligible. It is irrelevant whether the parent actually received a PFD.

In Mr. G.’s case, there is no evidence that he was not eligible for a PFD in any year. He has stated in argument that he believes he was ineligible in some years due to prolonged absences from the state, but since he declined to testify, there is no testimony to support this claim. His tax returns indicate that he has been an Alaska resident, eligible for dividends. Unless he had proven otherwise, the potential PFD would have to be included in his income. The regulation does not allow for exclusion of the dividend in situations where an eligible individual fails to receive one due to his own errors or indifference.²¹

C. Amended 1996 tax return

CSSD calculated the 1996 support amount from the tax return that appears at pages 2-6 of Exhibit 10. This tax return was accompanied by the Child Support Guidelines Affidavit that appears at page 1 of Exhibit 10. In the affidavit, Mr. G. swore that he had gross wages of \$26,522 in 1996.

With his appeal, Mr. G. submitted an amended tax return for 1996 showing much lower income.²² The copy he supplied was incomplete.²³ He also failed to supply a new Child Support Guidelines Affidavit, and since he refused to testify at the hearing, there is no new testimony to amend his sworn statement in his original affidavit. Accordingly, the income figure of \$26,522 for 1996 remains the only one supported by testimony. Mr. G. did not meet his burden on appeal of showing that CSSD’s use of that figure was incorrect.

²⁰ 15 AAC 125.070(e) (italics added).

²¹ Mr. G. may have elected not to seek his PFDs with any seriousness as a way of frustrating his creditors. If this is so, he has outsmarted himself.

²² Exhibit 19, pp. 2-9. The income is lower because he claimed a large number of additional business expenses.

²³ At a minimum, page 2 of Schedule C was left out.

IV. Conclusion

CSSD had authority to grant the August 17, 2005 Motion to Vacate Default Order filed on CSSD form 04-1907A. In granting the motion and recalculating the support amounts, the division correctly imputed a permanent fund dividend to Mr. G. for each year. The division also used the correct income figure for 1996, since it is the only figure supported by an affidavit or other sworn testimony. Accordingly, CSSD's disposition of this matter was correct in all respects.

V. Child Support Order

D. L. G. is liable for child support as set forth in the Administrative Child Support and Medical Support Order dated May 1, 2006, with attachments.

DATED this 7th day of July, 2006.

By: Signed
Christopher Kennedy
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 within 30 days after the date of this decision.

DATED this 25th day of July, 2006.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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