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

IN THE MATTER OF C. J. B.	)))	OAH No. 06-0515-CSS CSSD No. 001112523

DECISION AND ORDER

I. Introduction

This is C. J. B.'s appeal of a July 13, 2006 decision by the Child Support Services Division (Division) that disestablished paternity for J. S. but also declared Mr. B. responsible for child support arrears accrued before the genetic test on which the disestablishment was based. In effect, Mr. B. is attempting to file a late appeal of the earlier administrative order under which the arrears accrued.[1] A formal hearing was held to consider the child support obligation of Mr. B. (Obligor) for the support of the child, J. S. (Obligee).[2] Mr. B. and the Custodian, T. B., participated. David Peltier represented the Division. The central issue was whether the Commissioner of Revenue has the authority to waive the administrative appeal deadline and, through the hearing process, adjust the Division's order to give Mr. B. relief from the obligation to pay child support arrears.

After the hearing, on June 1, 2007, a proposed decision was issued. If adopted by the Commissioner, the proposed decision would have granted Mr. B. limited relief by releasing him from liability for uncollected arrears. The proposed decision concluded that it would work an injustice to strictly enforce the appeal deadline in this case. The Division filed a proposal for action asking that the Commissioner reject the proposed decision's legal conclusions as misinterpreting or misapplying certain statutes and a regulation.

Instead, the Commissioner returned the case to the administrative law judge under AS 44.64.060(e)(2) with the following instruction:

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[1] Mr. B.'s support obligation was initially established in 2002, when he failed to follow through with the steps necessary to contest paternity at that point. *See* Exhibit (Ex.) 10 (June 18, 2002 Administrative Child Support and Medical Support Order); Ex. 15 (November 22, 2002 Denial of Petition for Genetic Testing).

[2] The hearing was held under Alaska Statute 25.27.170.

> Further research and analyze the authority of the Department of Revenue and/or the Office of Administrative [H]earings to relax or waive the deadline for an appeal of an administrative support order. Issue a new proposed decision for consideration by the Commissioner of Revenue.[3]

Taking into account further research and analysis, this revised proposed decision concludes that the Commissioner of Revenue (and the Office of Administrative Hearings (OAH) when acting for the Commissioner[4]) has the authority to waive the appeal deadlines applicable to administrative support orders and should exercise that discretion in this case. The statutory deadline Mr. B. needed to meet to be ***entitled*** to a hearing on the support obligation does not preclude the Commissioner from exercising his discretion to ***allow*** a late appeal. The Department of Revenue regulation that allows for waiver of the regulatory deadline for an appeal when strict adherence would work an injustice has not been superseded by OAH's regulations. The federal requirement that a state have procedures in place to prohibit retroactive modifications does not preclude the Commissioner from exercising discretion to allow a late appeal of the support obligation by an obligor determined not to be the natural father of the child. The Alaska Supreme Court has granted similar relief under a civil rule standard that is narrower than the Department's regulation. The legislature has expressed the intent "that children be supported as much as possible by their natural parents[.]"[5] Ms. B. has disclosed to Division the identity of J.'s natural father. The state, therefore, may be able to collect support from the natural father, to recover some of the public assistance provided to J.

For these reasons, which are discussed in greater detail below, the Commissioner has the authority to allow Mr. B.'s late appeal of the administrative support order and can relieve him from the obligation to pay uncollected child support arrears, in much the same fashion as the courts afford relief to disestablished obligors.

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3 July 13, 2007 Order.

4 Under AS 44.64.040(b), the Office of Administrative Hearings' administrative law judge assigned to hear a child support-related appeal exercises the powers authorized by law for the Commissioner of Revenue in performance of the Commissioner's duties concerning the hearing. The office has no separate powers or legal authority specific to the enforcement of child support obligations. The statutes and regulations governing the office prescribe procedures that apply to hearing such cases but in no way alter the substance of the laws on child support. *See generally* AS 44.64.010 –AS 44.64.200; 2 AAC 64.100 – 2 AAC 64.990.

5 AS 25.27.170(d)(3).

II. Facts

The B.s were married in 2000 and separated six months later.[6] J. S. was born to Ms. B. on January 30, 2002, more than a year after the couple's separation. At the hearing, Ms. B. admitted that she knew at the time that J. was born that Mr. B. was not his father. Ms. B. explained that she did not intend to lie when Mr. B. was named as J.'s father on the birth certificate. Ms. B. stated that she was told that he had to be named as the father because Mr. B. was still married to her.[7] Ms. B. and Mr. B. always knew that Mr. B. was not J. S.'s father.[8] Ms. B. knows who J.'s father is.[9]

J. began to receive public assistance in January of 2002, the month that he was born.[10] The Division sent a request for information to Mr. B. on March 18, 2002.[11] On March 22, 2002, Mr. B. sent this request back with a hand written explanation of why he could not be the child's father.[12] Mr. B. also requested genetic testing.[13] The same day, the Division sent Mr. B. a genetic testing packet, which required him to pay $195 in genetic testing costs unless he could show that he was indigent.[14] The genetic testing packet also instructed him to complete and return the forms included in the packet.[15] Mr. B. failed to return the genetic testing packet to the Division.[16] At the hearing, Mr. B. explained that during the time the Division was sending the genetic testing packets, and for the next several years, he was either homeless or incarcerated due to drug abuse.

On May 1, 2002, the Division sent a letter to Mr. B. regarding his failure to return of the genetic testing packet.[17] Mr. B. did not respond. On June 12, 2002, the Division sent a Denial of Petition for Genetic Testing to Mr. B.[18] This was followed on June 18, 2002, by an

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6 Ex.6, page 2.
7 Recording of Hearing.
8 Recording of Hearing.
9 Recording of Hearing.
10 Ex. 6.
11 Ex. 6.
12 Ex. 6, page 2 (copy of March 18, 2002 order, receive stamped by the Division on March 22, 2002).
13 Ex. 6.
14 Ex. 7.
15 Ex. 7.
16 Ex. 8 (May 1, 2002 letter from the Division to Mr. B., indicating that the packet had not been returned to the Division and transmitting a second packet).
17 Ex. 8.
18 Ex. 9.

Administrative Child and Medical Support Order.[19] On September 11, 2002, Mr. B. appeared at the Division's office in Anchorage, Alaska.[20] While Mr. B. was there, the Division served him with the Administrative Child and Medical Support Order.[21] Mr. B. filed a Request for Administrative Review and provided a new address before he left.[22] On his Request for Administrative Review, Mr. B. explained that he had not received the earlier genetic testing packets because he had been living in a homeless shelter.[23] This was the last that the Division heard from Mr. B. for over three years.

Meanwhile, on September 13, 2002, the Division sent another genetic testing packet to Mr. B. at the new address that he had provided.[24] Mr. B. failed to return the genetic testing packet. The Division sent another letter to Mr. B. on October 14, 2002, reminding him that he needed to return the genetic testing packet to the Division so that genetic testing could be completed, and providing him yet another packet.[25] On November 22, 2002, the Division denied Mr. B.'s request for genetic testing due to his failure to return the Petition for Genetic Testing.[26]

The Division completed the Administrative Review of the support order on January 23, 2003, and issued an Amended Administrative Child and Medical Support Order setting ongoing support at $333.00 per month effective February 1, 2003.[27] This order also established arrears from January 30, 2002, to January 31, 2003, totaling $4,125.00.[28] The monthly child support amounts were based on default income amounts, because the Division did not have income or employment information for Mr. B.[29]

On February 2, 2006, the Division sent an additional genetic testing packet to Mr. B., and he completed the Petition for Genetic Testing on February 14, 2006, and returned it to the

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19 Ex. 10 (setting ongoing support at $337 per month, beginning July 1, 2002, and arrears of $2,022 for the period January 1-June 30, 2002).

20 Ex. 11 (return of service indicating that documents were served on Mr. B. at the Division's office).

21 Exs. 11 &12.

22 Exs. 11 &12.

23 Exs. 12 &13.

24 Ex. 13.

25 Ex. 14.

26 Ex. 15 (Denial of Petition for Genetic Testing, explaining that Mr. B. had been provided four testing packets between March and October 2002, had not completed any of them, and would therefore have to pursue the matter through the courts, if he still wanted to pursue it).

27 Ex. 16.

28 Ex. 16.

29 Ex. 16, page 4; Recording of Hearing.

Division.[30] On April 19, 2006, the Division issued an Administrative Order for Genetic Testing.[31] The genetic testing revealed a zero percent probability that Mr. B. is the biological father of J. S.[32]

On July 13, 2006, the Division issued the Administrative Order to Disestablish Paternity.[33] In the second paragraph, the order stated that Mr. B. would remain responsible for child support owed before the date of the petition (February 14, 2006). Mr. B. filed a request a formal hearing, asking for a refund of the child support already collected from him and contesting the order's statement that he "still owe[d] back child support" in light of the determination that he is not J.'s father.[34]

At the hearing, Mr. B. and Ms. B. both explained that they had always known that Mr. B. could not be J.'s biological father, but they believed that they would need to prove what they knew through genetic tests in order to stop the Division from attempting to collect child support from Mr. B.[35] Ms. B. stated that she had encouraged Mr. B. to complete the testing, and had never intentionally misled anyone about J.'s paternity. Ms. B. explained that she knew who J.'s biological father was, and was working with the Division to establish his paternity. Ms. B. explained that although Mr. B. had initiated genetic testing on more than one occasion, he had failed to follow through until 2006 because he was either homeless or moving around between correctional facilities due to drug charges, which meant he did not receive his mail and made it difficult to respond or focus on such matters.

At the hearing, the Division did not dispute that it was in the process of establishing a support obligation against J.'s biological father.[36] The Division asked for additional time to look into the status of that case. The Division also suggested that since Mr. B.'s arrears were based on default income information and Mr. B. was apparently indigent during the period between J.'s

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[30] Ex. 1.
[31] Ex. 2.
[32] Ex. 3.
[33] Ex. 4.
[34] Ex. 5.
[35] Recording of Hearing.
[36] Recording of Hearing.

birth and initiation of the disestablishment order, Mr. B. might qualify to have his arrears reduced to $50 per month under the default review provision's of AS 25.27.195(b).[37]

In a supplemental brief filed after the hearing, the Division explained its position on four issues regarding collection of unpaid arrears from Mr. B., despite the disestablishment of his paternity of J. and Ms. B.'s identification of the biological father.[38] The Division acknowledged that it "will be pursuing another individual for paternity and child support" for J. but argued that this should not relieve Mr. B. from liability for arrears.[39] The Division also argued that the prohibition against retroactive modifications prevents Mr. B. from being relieved of liability for arrears because he did not "successfully disestablish his paternity during the support order establishment process …" and that the cases in which the courts have relieved disestablished obligors from liability for arrears are factually distinguishable from Mr. B.'s case.[40] Finally, the Division argued that the "arrears became judgments when they became due and owing."[41]

In response to the June 1, 2007 proposed decision, the Division filed a proposal for action under AS 44.64.060 making arguments similar to those in the supplemental brief and asking that the Commissioner reject certain legal conclusions and affirm the order disestablishing paternity, including the part that declares Mr. B. to be responsible for child support accrued before February 14, 2006.[42] Neither Mr. B. nor Ms. B. filed a proposal for action.

III. Discussion

The main question in this case is purely legal: does the Commissioner have the authority to afford Mr. B. relief from the obligation to pay accrued child support under an administrative order that Mr. B. appealed through a paternity disestablishment action years after the support order was issued? If the answer to that question is "yes," a second question must be answered: should the Commissioner relieve Mr. B. from the obligation to pay arrears and, if so, should the relief be total or limited only to uncollected support?

A. The Commissioner's Authority to Grant Mr. B. Relief

The legal question on the Commissioner's authority requires analysis of whether the

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37 Recording of Hearing.
38 *See generally* August 31, 2006 Supplemental Brief.
39 August 31, 2006 Supplemental Brief, page 4.
40 August 31, 2006 Supplemental Brief, pages 2-4.
41 August 31, 2006 Supplemental Brief, page 5.
42 June 20, 2006 Proposed Action and draft order submitted with it.

child support statutes preclude the Commissioner from allowing a late appeal that reaches through the disestablishment back to an earlier administrative support order. If the answer is "no," then the legal question becomes whether the Department of Revenue's general appeal regulations allow the Commissioner to waive the appeal deadline. To answer that question, it is necessary to consider the Division's arguments that the department's waiver of deadline regulation has been superseded by OAH's regulations and that, in any event, waiving the deadline and relieving Mr. B. from the obligation to pay arrears would be a prohibited retroactive modification of the support order.

1. Child Support Statutes

The child support statutes arguably could limit the Commissioner's authority in two different ways: (1) by prohibiting a late appeal and (2) by forbidding changes to an administrative support order in a later disestablishment case.

i. The child support statutes do not prohibit a late appeal.

The statute that allows the Division to execute on a child support order not appealed within 30 days—AS 25.27.170—does not prohibit a good cause waiver of the appeal deadline. A statute must be interpreted "according to reason, practicality, and common sense, 'taking into account the plain meaning and purpose of the law as well as the intent of the drafters.'"[43] According to AS 25.27.170(e)(3), it is "the intent of the legislature that children be supported as much as possible by their natural parents[.]" This intent is to be considered in the hearing process when determining payments to be made "to satisfy the past, present, and future liability of the alleged obligor[.]"[44]

The plain meaning of the hearing-authorizing provisions of AS 25.27.170, taken alone or in conjunction with the purpose of the statute as a whole, support the conclusion that the statute does not preclude the Commissioner from exercising discretion to allow a late appeal of the support order. In full, AS 25.27.170 states the following:

> (a) A person served with a notice and finding of financial responsibility is entitled to a hearing if a request in writing for a hearing is

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[43] *Alaska Department of Commerce, Community and Economic Development v. Progressive Casualty Ins., Co.*, 165 P.3d 624, 628 (Alaska 2007) (citations omitted); *see also* AS 01.10.040(a) (requiring that words and phases be construed "according to their common and approved usage" and that technical words be construed according to their "peculiar and appropriate meaning" if they have acquired such a meaning).

[44] AS 25.27.170(d)&(e).

> served on the agency by registered mail, return receipt requested, within 30 days of the date of service of the notice of financial responsibility.
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> (b) If a request for a formal hearing under (a) of this section is made, the execution under AS 25.27.062 and 25.27.230 - 25.27.270 may not be stayed unless the obligor posts security or a bond in the amount of child support that would have been due under the finding of financial responsibility pending the decision on the hearing. If no request for a hearing is made, the finding of responsibility is final at the expiration of the 30-day period.
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> (c) If a hearing is requested, it shall be held within 30 days of the date of service of the request for hearing on the agency.
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> (d) Except as provided in (g) of this section, the hearing officer shall determine the amount of periodic payments necessary to satisfy the past, present, and future liability of the alleged obligor under AS 25.27.120, if any, and under any duty of support imposable under the law. The amount of periodic payments determined under this subsection is not limited by the amount of any public assistance payment made to or for the benefit of the child.
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> (e) The hearing officer shall consider the following in making a determination under (d) of this section:
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> (1) the needs of the alleged obligee, disregarding the income or assets of the custodian of the alleged obligee;
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> (2) the amount of the alleged obligor's liability to the state under AS 25.27.120 if any;
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> (3) the intent of the legislature that children be supported as much as possible by their natural parents;
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> (4) the ability of the alleged obligor to pay.
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> (f) Except as provided in (g) of this section, if the alleged obligor requesting the hearing fails to appear at the hearing, the hearing officer shall enter a decision declaring the property and income of the alleged obligor subject to execution under AS 25.27.062 and 25.27.230 - 25.27.270 in the amounts stated in the notice and finding of financial responsibility.
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> (g) If the agency is establishing only a medical support order, the hearing officer shall enter a decision about the parents' respective responsibilities for the child's health care expenses that complies with the requirements of AS 25.27.060 (c).

Subsection (a) creates an entitlement to a hearing, if a written request for hearing is filed within 30 days after service of a notice. As such, it suggests that the Commissioner could deny a late request for a hearing on the basis that the entitlement to a hearing is not enforceable after 30 days. That is not the same as saying that the Commissioner is forbidden to exercise discretion to allow a late appeal if justice so requires. For subsection (a) to be read that way, it would need to

contain language indicating that failure to timely file a hearing request cuts off all opportunity to be heard by an executive branch decisionmaker, even if being heard and receiving some relief would be crucial to correct executive branch errors. It would have to say something to the effect that an alleged obligor is entitled to a hearing if, ***and only if***, that person requests a hearing within 30 days. Subsection (a) does not say that, or anything like it, or otherwise suggest that the legislative intent was to limit the Commissioner's exercise of discretion to provide relief through a late appeal.

Subsection (b) makes the finding of financial responsibility final after 30 days if no hearing request is filed. As such it allows the Division to treat an un-appealed Notice and Finding of Financial Responsibility as a final administrative order subject to the execution under AS 25.27.062 and 25.27.230 - 25.27.270 beginning 30 days after the notice is served. This statute does not limit the Commissioner's authority to waive the appeal deadline, because it does not address waivers of the appeal deadline. Read in context with the rest of the subsection, which requires the Division to enforce the order being appealed during the appeal process unless a bond is issued, the final-after-30-days language simply addresses the timing of collections during the administrative appeals process. It does not prohibit late appeals.

AS 25.27.170 creates a broad outline of the procedure for the appeals of administrative child support orders and collections on the most current order while an appeal is pending. This broad statutory outline does not even include the Division's administrative review process that leads to the issuance and review of administrative support orders. The statute, therefore, does not include a deadline for filing an appeal of an administrative review decision since the statute apparently assumes a process whereby an appeal of an original child support order goes straight to formal hearing.

Accordingly, the appeal at issue here is a creature of regulation, not of statute. The department's regulations will be the source of any applicable deadline and powers to waive such deadlines, unless the Commissioner is prevented by statute from exercising discretion he retained under the regulations.

ii. The child support statutes do not forbid changes to an administrative support order in a later disestablishment case.

The child support statutes express the intent "that children be supported as much as possible by their natural parents[.]"[45] This intent is one factor that must be considered in making a determination through the hearing process about the amount of liability for past support.[46] The statutory authority to grant relief from an administrative support order after disestablishment of paternity is relatively broad, limited only by the possibility that federal law might prohibit a particular kind of relief.[47] Specifically, AS 25.27.166(d) provides:

> If a decision under this section disestablishes paternity, the petitioner's child support obligation or liability for public assistance under AS 25.27.120 is modified retroactively to extinguish arrearages for child support and accrued liability for public assistance based on the alleged paternity that is disestablished under this section. This subsection may be implemented only to the extent not prohibited by federal law.

This statute has been interpreted by the Department of Revenue in prior administrative appeals to allow waiver of an administrative appeal deadline to prevent the collection of unpaid arrears after a disestablishment.[48]

In one such case, the department's decision waived the appeal deadline ten years after the obligor first received notice that the division considered him financially responsible to support a child that was not his.[49] Due process concerns were raised because of the content of the notice, but the obligor had received notice. He did not appeal within the period immediately because he was having difficulty dealing with financial and other matters due to domestic violence, alcohol

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45 AS 25.27.170(d)(3).

46 AS 25.27.170(d)(3).

47 *Ferguson v. State, Dep't of Revenue, Child Support Enforcement Div.,* 977 P.2d 95, 101-102 (Alaska 1999) (illustrating that relief afforded to obligors following administrative disestablishment of paternity under AS 25.27.166 can be broader than that afforded by judicial disestablishment under Civil Rule 60 because the statute extinguishes arrears and accrued liability for public assistance "to the extent no prohibited by federal law").

48 *See, e.g., In the Matter of S. S.,* Child Support No. 001012741, Department of Revenue Decision on Appeal, Caseload No. 010654 (August 2002) (waiving appeal deadline and relieving disestablished obligor from liability for uncollected arrears despite two-year delay between notice request for genetic testing, during which paternity had been established by default); *In the Matter of G.G.,* Child Support No. 001043892 Department of Revenue Order on Remand, Caseload No. 040119 (October 2004) (waiving appeal deadline despite ten years delay in filing, and ordering that the division suspend collection of unpaid support, where delay in seeking disestablishment was due, at least in part, to domestic violence, alcohol abuse, and depression); *but compare In the Matter of B. D.*, Child Support No. 001101020, Department of Revenue Decision on Appeal, Caseload No. 020394 (September 2002) (declining to relax appeal deadline where no good cause existed for obligor's delay in filing because obligor's testimony that he did not remember being served with notice was not credible and the division had already ceased collection and refunded all undisbursed support collected prior to disestablishment).

49 *In the Matter of G.G.,* Child Support No. 001043892 Department of Revenue Order on Remand, Caseload No. 040119 (October 2004).

abuse and depression problems. The department's decision, therefore, waived the appeal deadline and accepted this very late appeal, and went on to relieve the obligor from liability for uncollected support. The authority to do so was found in the department's waiver regulation, 15 AAC 05.030(k).

2. Department of Revenue Waiver Regulation

Appeals of administrative child support orders are conducted under the procedures set out in Department of Revenue regulations in 15 AAC 125.118, 15 AAC 05.010, 15 AAC 05.025—15 AAC 05.040, and Office of Administrative Hearings regulations in 2 AAC 64.100—2 AAC 64.990. The Department's procedures govern to the extent the procedures are not superseded by the procedural regulations for OAH hearings in 2 AAC chapter 64.[50]

i. The Department's procedures permit waivers.

After an administrative support order is issued establishing an obligor's duty to pay child support, a party may file a request for an administrative review.[51] One subject of the administrative review can be whether a duty of support is actually owed.[52] The administrative review is conducted by a Division employee called a "review officer."[53] The review officer issues a written decision, which must include findings on the support award and the obligation to provide health insurance, and may direct the division to make adjustments—i.e., to issue an Amended Administrative Child and Medical Support Order.[54] This administrative support order can be appealed "to a formal hearing under 15 AAC 05.030 but is not a final administrative determination for purposes of appeal to the superior court."[55]

For the formal hearing stage, the appeal is referred to OAH.[56] The hearing is conducted in accordance with the Department of Revenue regulations in 15 AAC 05.010 and 15 AAC 05.025—15 AAC 05.040.[57] One of those regulations (15 AAC 05.030(k)) allows for a waiver of

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50 2 AAC 64.100(c); *also* AS 44.64.060(a) (stating "to the extent regulations adopted by an agency for the conduct of an administrative hearing conflict with regulations adopted by the [OAH] chief administrative law judge under this subsection, the regulations adopted by the chief administrative law judge control to the maximum extent possible without conflicting with applicable statutes).

51 15 AAC 125.118(a).

52 15 AAC 125.118(d)(2).

53 15 AAC 125.118(c).

54 15 AAC 125.118(e); 15 AAC 125.090.

55 15 AAC 125.118(f); *also* 15 AAC 05.020(c) & 15 AAC 05.025.

56 AS 44.64.030(a)(18) & 2 AAC 64.120.

57 15 AAC 125.118(f).

any deadline established in 15 AAC 05.010—15 AAC 05.030. The 30-day deadline for appealing to formal hearing from a child support administrative review decision is established in 15 AAC 05.010(b)(6). The regulatory waiver in section 030(k), therefore, can be used to waive the deadline for filing an appeal seeking a formal hearing from a child support administrative review decision.

Section 030(k), the waiver regulation, speaks in terms of the "hearing officer" waiving a deadline. The OAH administrative law judge functions as the "hearing officer."[58] Following closure of the record in the appeal and issuance of a proposed decision by the OAH administrative law judge who heard the appeal, and after the parties have been allowed an opportunity to file proposals for action, the Commissioner may adopt, change or reject the proposed decision.[59] The Commissioner's decision is considered the final agency decision, which can be appealed to superior court.[60]

In sum, the Commissioner (not the Division or the OAH administrative law judge) is the final executive branch decisionmaker for an administrative child support order appealed to a formal hearing. The Division has the right to file a proposal for action before the Commissioner or his designee adopts a proposed order, but neither the OAH administrative law judge nor the Division may dictate how the Commissioner exercises his adjudicatory authority to accept or reject the Division's policy determinations as announced through its administrative review decisions or its position at the formal hearing in any particular case.

ii. The Department's waiver regulation has not been superseded.

The OAH regulations supersede Department of Revenue procedural regulations only to the extent that they are in direct conflict and cannot be harmonized.[61] The Department of Revenue waiver regulation—15 AAC 05.030(k)—allows waiver of an appeal deadline when necessary "to avoid an injustice."[62] This is different from the OAH regulation—2 AAC 64.910—

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58 *See* AS 44.64.200(2) (defining "administrative law judge" as "a hearing officer who is retained or employed by the office"); AS 44.64.040(b) (authorizing OAH administrative law judges to exercise the powers of the

59 AS 44.64.060(d)-(e); 2 AAC 64.340(c).

60 AS 44.64.060(f); Alaska R. App. P. 602(a)(2).

61 2 AAC 64.100(c).

62 15 AAC 05.030(k), which states in pertinent part:

> The hearing officer may waive any requirement or deadline established in 15 AAC 05-010—15 AAC 05.030 if it appears to the officer that strict adherence to the deadline or requirement would work an injustice[.]

that permits an administrative law judge to shorten or extend deadlines for "good cause."

The authority to grant a "good cause" based extension of a deadline in the course of an administrative appeal can readily be harmonized with the authority to grant a waiver needed to avoid the injustice of being barred from appealing. The first is purely a procedural mechanism to manage the case by adjusting deadlines in the course of the appeal once it is before OAH. The second, when applied to waive the appeal filing deadline, is not a procedural mechanism but rather the reservation of discretion to allow the late-filer to pursue a substantive right. Because OAH could not by regulation create the right to an appeal[63] but the Department of Revenue has done exactly that, the OAH deadline-adjustment regulation and the Revenue waiver regulation are not in conflict. The OAH regulation does not purport to allow injustice-avoidance waivers to the Department of Revenue appeal deadline but rather allows only adjustments of deadlines once a case is before OAH. The OAH regulation simply does not apply to the deadline in dispute in this case.

The Division's reading of the OAH procedural regulations as superseding the Department of Revenue regulation for the waiver of the deadlines in the Department's administrative appeals process would limit the Commissioner's ability to ensure that the Department's administrative deadlines that fall before the referral to the Office of Administrative Hearings are waived in appropriate cases. The OAH regulation in question was promulgated under the authority of the Chief Administrative Law Judge, rather than the Commissioner of Revenue.[64] The net effect of the Division's interpretation would be the transfer of the Commissioner's rulemaking authority on these waivers to OAH.

iii. Due process can demand waiver of appeal deadlines.

The constitutional right to due process can dictate that an obligor must be afforded the right to defend against child support enforcement efforts.[65] Due process dictates that an alleged

[63] OAH could not create a substantive right to a late appeal through the procedural regulations required under AS 44.64.060(a). AS 44.64.030(d) states: "Nothing in this chapter may be construed to create a right to a hearing or to require a hearing that is not required under other law." By extension, OAH could not through its regulations create a right to a hearing by making exceptions to appeal filing deadlines established in the applicable laws.

[64] AS 44.64.060(a) provided OAH the statutory grant of authority to promulgate waivers of deadlines in OAH hearings.

[65] *See, e.g., State, Dep't of Revenue, Child Support Enforcement Div. v. Beans,* 965 P.2d 725, 727-728 (Alaska 1998) (ruling that an "inability to pay" defense is a constitutionally required defense to enforcement of the law requiring revocation of a driver's licenses for failure to pay child support).

obligor be afforded an opportunity to be heard before a support obligation is imposed.[66] One purpose of the Department of Revenue appeal regulations is to ensure that the parties to an administrative appeal of a child support enforcement action are afforded due process.

As the source of a broad statutory outline for an appeals procedure that does not explicitly provide an exception to the appeal filing deadline, AS 25.27.170 should be read as allowing such an exception to avoid denial of due process to those parties who unavoidably fail to meet a deadline. If, for example, an obligor were in a coma or otherwise incapacitated, due process would be denied the obligor if AS 25.27.170(b) were interpreted as imposing an absolute prohibition on late-filed appeals. Due process sometimes demands an exception to the appeal filing deadline and the Department of Revenue has provided that exception in 15 AAC 05.030(k).

Once an agency creates a procedural right in regulation, even if that procedural right was not required by statute or the constitution, the agency must allow an administrative appellant the benefit of that procedural right.[67] Though Mr. B. may not have an unqualified right to pursue a late appeal of the administrative support order, he has the right to have the Commissioner, in the exercise of discretion, determine whether a section 030(k) waiver of the appeal filing deadline is necessary to avoid injustice caused by strict enforcement of the deadline.

iv. The Department's waiver authority is broad.

Under 15 AAC 05.030(k), a deadline can be waived if strict enforcement of it "would work an injustice[.]" Under Alaska Rule of Civil Procedure 60(b), the courts similarly have

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66 *See Bostic v. State, Dep't of Revenue, Child Support Enforcement Div.,* 968 P.2d 564, 568 (Alaska 1998), in which the Alaska Supreme Court stated:

> "Due process of law requires that before valuable property rights can be taken directly or infringed upon by governmental action, there must be notice and an opportunity to be heard." When a party raises a due process claim, we first must determine "whether there is a 'deprivation of an individual interest of sufficient importance to warrant constitutional protection.' " We conclude that when the State seeks to increase child support, "a significant property interest is often at stake."

(Citations omitted.)

67 *Bostic v. State, Dep't of Revenue, Child Support Enforcement Div.,* 968 P.2 564, 569 (Alaska 1998).

authority to provide relief from child support orders using a test that is somewhat different but certainly no broader than the department's avoidance-of-injustice test.[68]

Under the court rule, the trend of Alaska Supreme Court cases has been to provide more relief to disestablished child support obligors and to encourage the division to seek child support from the biological father rather than the disestablished men who were the "legal" fathers prior to disestablishment of their paternity.[69] For example, in several cases the Alaska Supreme Court has held that if an obligor disestablishes his paternity under circumstances that would entitle him to retrospective relief under Civil Rule 60(b), he should not have to pay uncollected child support.[70] The court's reasoning is as follows:

> When paternity is disestablished and a support obligation vacated on a ground that would warrant relief under Rule 60(b), [the division] ordinarily will be required to reimburse all funds in its possession when the paternity action was filed, as well as any additional funds it collects thereafter, regardless of whether those funds reflect child support debt accruing before or after the date of filing.[71]

Previously, the court sometimes found that relief from the obligation to pay arrears was

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[68] The civil rule provides six groups of grounds for providing relief from a judgment or order. They include specifics such as fraud, mistake and newly discovered evidence, and the broadest ground is "any other reason justifying relief from the operation of the judgment." Alaska R. Civ. P. 60(b)(6). This last ground is the one most similar to the Revenue regulation's avoidance-of-injustice test insofar as the courts consider it a "catch-all provision" and liberally construe it to enable themselves "to vacate judgments whenever such action is necessary to accomplish justice." *Atcherian v. State, Dep't of Revenue, Child Support Enforcement Div.,* 14 P.3d 970, 976 (Alaska 2000).

[69] *See Ferguson v. State, Dep't of Revenue, Child Support Enforcement Div.*, 977 P.2d 95, 100-101 (Alaska 1999) (affirming superior court's disestablishment order vacating prospective child support payment obligation under Civil Rule 60(b)(5) but declining to consider whether more comprehensive relief might have been available had the obligor sought it); *Kilpper v. State, Dep't of Revenue, Child Support Enforcement Div.,* 983 P2d. 729, 732-734 & n. 17 (Alaska 1999) (remanding case for further proceedings and suggesting that relief broader than prospective relief from ongoing support might be available under Civil Rule 60(b)); *State, Dep't of Revenue, Child Support Enforcement Div. v. Wetherelt*, 931 P.2d 383, 384, 391 (Alaska 1997) (ordering reimbursement of wages garnished after disestablished obligor's filing of a motion to reaffirm non-paternity, including wages garnished to satisfy unpaid arrears); *State, Dep't of Revenue, v. Button, Child Support Enforcement Div.,* 7 P.3d 74, 78 (Alaska 2000) (affirming superior court's decision prohibiting the division from collecting arrears from a disestablished obligor because he rebutted the presumption of paternity "at his first formal opportunity and before a final support order was issued…"); *State, Dep't of Revenue, Child Support Enforcement Div. v. Maxwell*, 6 P.3d 733, 737 (Alaska 2000) (affirming superior court order vacating child support arrears but limiting required refund to funds retained by the state); *Atcherian,* 14 P.3d at 976 (affirming superior court order relieving disestablished obligor of requirement to pay uncollected arrears).

[70] *See State, Dep't of Revenue, Child Support Enforcement Div. v. Button*, 7 P.3d 74, 78 (Alaska 2000); *State, Dep't of Revenue, Child Support Enforcement Div. v. Maxwell*, 6 P.3d 733, 737 (Alaska 2000); *Atcherian v. State; Dep't of Revenue, Child Support Enforcement Div.,* 14 P.3d 970, 976 (Alaska 2000); *State, Dep't of Revenue, Child Support Enforcement Div. v. Wetherelt*, 931 P.2d 383, 391 (Alaska 1997).

[71] *Atcherian,* 14 P.3d at 976 (referring to the "general principle implicit in *Wetherelt*" *supra* and the decision validating that principal in *Maxwell supra*).

not available to a disestablished obligor because the particular part of Civil Rule 60(b) on which the request was based does not allow retrospective relief. For instance, in *Ferguson v. State* the court held that a valid final child support order could not be set aside, even though the obligor had disestablished his paternity, because retrospective relief was not available under Civil Rule 60(b)(5).[72] As the trend evolved over time, the court distinguished its *Ferguson* holding by pointing out that it had noted: "we need not consider whether more comprehensive relief might have been granted under some other part of Rule 60(b)."[73] By the year 2000, the court had firmly established that other parts of Civil Rule 60(b) could be invoked under appropriate circumstances to preclude further collection of unpaid arrears from a disestablished obligor.[74]

Mr. B.'s situation is different from that of disestablished obligors in some of the cases. Unlike the cases in which the court concluded that an obligor was entitled to retrospective relief because of a due process problem, Mr. B. was not deprived of due process in the establishment of his child support and had not preserved his appeal rights. This is the distinction that forms the heart of the division's opposition to retrospective relief for Mr. B. If he had requested paternity testing and testing at some time in the past had wrongfully been denied, or if he had followed through with testing before his appeal rights on the Amended Administrative Child and Medical Support Order had expired, the division has made it clear it would not be seeking arrears.

A denial of due process, which renders an order void under Civil Rule 60(b)(4), however, is not the only reason that an individual may be afforded retrospective relief under Civil Rule 60(b). Although it is not clear that Mr. B. would be entitled to such relief under Alaska Civil Rules 55(e) and 60(b), it is not certain that he would not. The Amended Administrative Child and Medical Support Order that the division seeks to enforce was in essence a default judgment. Mr. B. did not timely respond to that order and his appeal rights had expired. Civil Rule 55(e) allows relief from a default order set aside pursuant to Civil Rule 60(b). Civil Rule 60(b)(1)-(3) allows even a contested judgment to be set aside due to mistake, inadvertence or excusable neglect if the request to set it aside is made within a year of the judgment. Civil Rule 60(b)(6)

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72 977 P.2d at 100-101.

73 S*ee Atcherian v. State, Dep't of Revenue, Child Support Enforcement Div.,* 14 P.3d 970, 975 & n. 22 (Alaska 2000) (quoting *Ferguson, supra*, and explaining that the court had "never entirely foreclosed the possibility that [the division] might be required to pay full restitution in truly exceptional situations …").

74 *See, e.g., Button,* 7 P.3d at 78; *Maxwell*, 6 P.3d at 737; *Atcherian,* 14 P.3d at 976.

allows a judgment to be set aside even after a year if justified due to extraordinary circumstances not covered by other parts of the rule.

An obligor who disestablishes his paternity after a default administrative child support order is issued should be afforded at least the same relief he would be afforded under the Alaska Civil Rules if the order had been established in court. The Revenue regulations permit that because the standard for waiving the appeal deadline under 15 AAC 05.030(k) is at least as broad as Civil Rule 60(b) and arguably less restrictive because it is discretionary. Under 15 AAC 05.030(k), an administrative appeal requirements or deadlines established in 15 AAC 05.010—15 AAC 05.030 may be waived if it appears that strict adherence to the deadline or requirement would work an injustice. This provides the Commissioner (acting through the hearing officer) discretion to address issues that have been decided in a final order after the administrative deadlines have passed. As such, the regulation provides broader authority and discretion than is incorporated in Civil Rule 60(b), which lists circumstances under which relief may be granted and includes the one year time limit for some circumstances, and contains a broader catch-all provision that does not apply when the listed circumstances exist.[75]

Precisely because the grant of a section 030(k) waiver is discretionary, and exercise of that discretion is to avoid injustice, the Commissioner can consider whether waiving an appeal deadline to give a disestablished obligor relief from collection of arrears in a particular case might compromise the child support enforcement program. For example, it is appropriate to consider whether allowing a late appeal in Mr. B.'s case and affording him relief from the obligation to pay uncollected arrears would constitute a prohibit retroactive modification of the administrative order.

v. Use of the Department's waiver authority is not prohibited.

The limited retrospective relief available to Mr. B. is not prohibited under federal law, any more than was the relief granted to disestablished obligors by the Alaska Supreme Court is cases providing post-disestablishment relief. The arrears the division is seeking in this case are not arrears that accrued "under any child support order" as that term is used in the federal laws

[75] The catch-all provision in clause six of Civil Rule 60(b), which is most like the Revenue regulation's avoidance-of-injustice standard, provides relief only if the other clauses are not applicable under the circumstances. *O'Link v. O'Link*, 632 P.2d 225, 229 (Alaska 1981).

requiring that state child support enforcement programs place certain limits on the retroactive modification of support orders.[76] Although final for the purpose of enforcement, this order is still subject to review in a late administrative appeal under15 AAC 05.030(k). Because the circumstances in the case make strict application of the appeal deadlines unjust, the order was still within the administrative appeals process when Mr. B. requested testing. It is still subject to being set aside or amended. This is not a retroactive modification. It is an order granting a late appeal, which has the practical effect of setting aside a default judgment.

The Division argues that affording Mr. B. relief would be an impermissible retroactive modification but yet acknowledges that the arrears in this case are subject to retroactive adjustment under the "default review" provisions of AS 25.27.195(b). Either statutorily authorized retroactive revisions of default child support orders are federally prohibited retroactive modifications or they are not. The nature of the proceeding, not its effect, determines whether the action is prohibited.

The federal law prohibits the institutionalization of a retroactive modification process, which would have the effect of making child support orders easier to challenge than other types of civil judgments. In this case, the Division's position is that the federal law requires that child support orders be treated with more sanctity than all other types of judgments, which can be set aside upon special showings, or set aside "in effect" by the acceptance of a late appeal. This is inconsistent with the division's position regarding AS 25.27.195(b).

The Alaska Supreme Court has characterized AS 25.27.166(d) as providing for a retroactive modification.[77] It also has characterized AS 25.27.195(b) as providing for a retroactive modification.[78] In its proposal for action the Division argues that an adjustment of arrears under AS 25.27.195(b) is not a retroactive modification because the adjustment requires that the original order be vacated. The Division is correct that AS 25.27.195(b) does not provide

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[76] By statute and regulation, the federal government requires states to have certain procedures in place regarding collection of child support payments and one requirement is that a support order not be subject to retroactive modification, except for the period after notice has been given of a petition for modification. 42 U.S.C.A § 666(a)(9) (2000 & Supp. 2007); 45 C.F.R. § 303.106 (Oct. 2007).

[77] Alaska Civil Rule 90.3(h); *Lawson v. Lawson,* 108 P.3d 883, 889 n. 35 (Alaska 2005).

[78] *Hendren v. State, Dep't of Revenue, Child Support Enforcement Div.,* 957 P.2d 1350, 1352 (Alaska 1998); *Lawson,* 108 P.3d at 889 n. 35.

for a federally prohibited retroactive modification. It is in essence a special provision for setting aside certain default orders.

Similarly, administrative orders that set aside default orders by relaxing an appeal deadline are not federally prohibited retroactive modifications. There is no need to vacate the original order when an appeal deadline is waived because that order is still subject to amendment in the administrative appeal process.

Enforceable administrative child support orders often are subject to amendment in the administrative appeals process. Obligors whose arrears are increased as the result of an amendment made during an administrative appeal often complain, and characterize the increase as a retroactive modification. The Division's consistent position has been that all periods of support covered by an order are subject to amendment during the administrative appeal process.

Waiving the appeal deadline to provide some disestablished obligors with the relief authorized under statute and regulation is not a retroactive modification prohibited by federal law. Arguably, setting aside a default administrative child support order in order to provide relief to the disestablished obligor in this case does not skate as close to the line of the federal prohibition as AS 25.27.195(b), the statue that the Division suggested should be applied in this case. The waiver also gives effect to the legislative directive in AS 25.27.166(d). Implementing AS 25.27.166(d) only to the extent permitted by regulations to relax an appeal deadline when it would work an injustice to enforce the deadline is not prohibited by federal law.

B. Grounds for Waiving Deadline and Granting Limited Relief

This case was referred to the Office of Administrative Hearings as an appeal of an administrative disestablishment order. Mr. B. is not contesting that order. Instead, he is attempting to make a late appeal of the Division's Amended Administrative Child and Medical Support Order. No one is asserting that Mr. B. is the biological father. No one is arguing that Mr. B. is liable for ongoing child support. Mr. B. is seeking relief from future collection of arrears and reimbursement of child support the Division has collected.

The Division argues that it should not have to pay back the $185.88 in child support collected from Mr. B. on June 27, 2005, and that it should be allowed to collect child support arrears from January 2002, the month that J. S. was born and first received public assistance, through February of 2006, the month the Division received the first completed Petition for

Genetic Testing from Mr. B.. The Division has not collected any additional child support from Mr. B. since that month.

It would work an injustice to require Mr. B. to pay child support arrears for four years instead of collecting child support for that period from the child's biological father. Mr. B. notified the Division, before it established a child support order against him, that he could not be the biological father. The child's mother would have confirmed that had the Division checked with her. Mr. B. was unable to complete the genetic testing process until his third attempt due to homelessness, drug addiction and incarceration.

The Division correctly points out that Mr. B. took three years to respond to its final child support order, and that Mr. B.'s child support arrears probably would be reduced to $50 per month if he asked for an adjustment under AS 27.25.190(b). These factors decrease the injustice to Mr. B. of enforcing the appeal deadline in this case. If Mr. B.'s delay in prosecuting his appeal prevented the Division from being able to collect support from the biological father, waiving the deadline perhaps would have been a closer question. The Division has not alleged that it will be able to collect less from the biological father than from Mr. B.

Furthermore, relieving the biological father of his child support obligation would work an injustice on the child by not requiring the child's father to pay for his support, as well as an injustice on the child and the state of not establishing a child support order for arrears that is based on the income of the child's biological father. Providing the child with a minimum child support order against an indigent obligor such as Mr. B., who is not biologically related to the child, is at odds with the legislative intent that "children be supported as much as possible by their natural parents" and that the needs of the child be considered in establishing the support amount.[79] The division is attempting to avoid a double recovery of child support and enforce its valid support order against Mr. B. as the law requires, absent a waiver of the appeal deadline he failed to meet. The Division is correct in pointing out that a waiver of the deadline after such an extended period is very unusual, but so are the circumstances in this case. Such an unusual waiver is required in order to avoid an injustice.

The Division argued in its proposal for action that the issue concerning plans for collection of support from J.'s biological father is whether the administrative law judge, and the

Commissioner through his adoption authority, may "make policy decisions." That is not really the issue. Rather, the issue is how the Division's stated policy and its plans for implementation of the policy in this case relate to whether strict adherence to the appeal deadline would work an injustice. The injustice that may result from adherence to the deadline can be determined only through consideration of the consequences of strict adherence. The division's collection plans concerning the biological father are relevant to that determination.

It would work an injustice to attempt collect arrears from a man unrelated to the child because he was late responding to the Division's child support action due to problems caused by addiction and homelessness, when the net result of refusing to waive the deadline would be that the Division will decline to attempt to collect child support from the biological father, who may prove to be a more promising source of support, for this same period of time.

In sum, a 15 AAC 05.030(k) waiver of the appeal deadline and relief from collection of unpaid arrears should be granted to Mr. B. in this case to avoid injustice. Mr. B. is not J.'s biological father. Ms. B. knew that Mr. B. was not the child's father, and could have worked with the Division to establish a child support order against the biological father. The biological father had a duty to support the child from birth. Allowing a default order to be established against an indigent man who is not the father and who was and is unlikely to be able to provide significant support for the child is not in the child's best interest. It is also unlikely that this is the best way to ensure that the state will receive reimbursement for the assistance that Ms. B. was receiving on the child's behalf.

The relief afforded Mr. B. under these circumstances, however, should not require the state to reimburse him for the small amount of support already collected. Mr. B. was not deprived of due process. Though some of the circumstances leading him to delay pursuing disestablishment may have been beyond his control, the causes were not the fault of the state and child support program should not be forced to reimburse him for monies already collected and used to defray the state's cost of providing J. with public assistance prior to Mr. B.'s completion of the disestablishment petition. Thus, his request for reimbursement of the $185.88 collected should be denied, but he should be relieved of liability for any additional arrears remaining uncollected.

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[79] AS 25.27.170(e)(1)&(3).

IV. Conclusion

The Commissioner of Revenue (acting through the hearing officer) has the discretion under 15 AAC 05.030(k) to waive the appeal deadline in order to change the administrative order to afford Mr. B. relief from the obligation to pay uncollected arrears. Though it is reasonable to be concerned about whether relieving a disestablished obligor from liability for arrears might be viewed as a prohibited retroactive modification of a support order, the federal laws that give rise to that prohibition and the Alaska Supreme Court case law support a conclusion that neither state nor federal law prohibits relief from payment of uncollected arrears for a disestablished obligor. Just as the Department could, as a matter of enforcement discretion, elect not to pursue collection of support in a specific case without running afoul of state or federal law, or setting a bad precedent, the Commissioner can use his discretion as an adjudicator under 15 AAC 05.030(k) to avoid injustice in the specific circumstances of Mr. B.'s case.

V. Child Support Order

The July 13, 2006 Administrative Order to Disestablish Paternity is

(1) affirmed as to the first paragraph, which disestablishes C. J. B.'s paternity of J. S.;

(2) amended so that the second paragraph reads as follows:

> C. J B. is not responsible for child support accrued before 02/14/06 (the date of the Petition for Genetic Testing) except that the $185.88 already collected by the Child Support Services Division may be applied toward payment of the cost of genetic testing or toward accrued child support and not refunded to Mr. B., who is not liable for any child support for J. S. remaining uncollected as of February 14, 2006.

DATED this 5th day of May, 2008.

By: *Signed*
Mark T. Handley
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, Mr. B.'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 Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 7th day of May, 2008.

By: *Signed*
Signature
Jerry Burnett
Name
Director, Admin Services
Title

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