

IN THE SUPREME COURT OF OHIO

10-0063

Lawrence Tuckosh,
Plaintiff-Appellant

On Appeal from the Youngstown County
Court of Appeals, Seventh Appellate District

v.

Court of Appeals Case No. 09-HA-4

Carol Cummings,
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Carol Cummings, Pro Se
91 Maple Street #18
Oberlin, Ohio 44074

Lawrence Tuckosh, Pro Se
4101 Grasmere Run
Mason, Ohio 45140

Appellant Carol Cummings hereby files her Memorandum in Support of Jurisdiction with the Supreme Court of Ohio from the judgment of the Youngstown County Court of Appeals, Seventh Appellate District, entered in Court of Appeals case number 09-HA-4 on Dec 2, 2009.

Respectfully submitted,
Carol Cummings
Carol Cummings, Pro Se

Proof of Service

I certify that a copy of this Notice of Appeal was sent by ordinary US mail to Lawrence Tuckosh, 4101 Grasmere, Mason, Ohio 45140 on Jan 8, 2010,

Carol Cummings
Carol Cummings

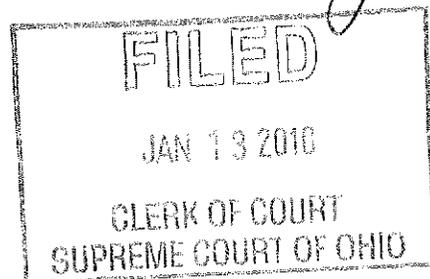


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
AND GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents a critical issue of public and great general interest regarding the fundamental due process rule of law that a party to litigation [in this case the parental guardian of two minor children] is entitled to her day in court.

The issue herein of public and great general interest addresses the contrary-to-law precedent set by the Court of Appeals that despite the undisputed law that the Ohio legislature under O.R.C. 3119.63 (C) specifically guarantees the constitutional right of litigants to contest the decision of an administrative agency to a trial court within a specified time period after the administrative decision, the trial court's attempted adoption, without jurisdiction, of the administrative decision before the party exercises her right to review within the statutory period precludes the litigant from exercising her constitutional due process right to her day in court. Richards v. Jefferson County (1996) 517 U.S. 793, 798 ("the deep rooted historical tradition that everyone should have his own day in court"); Ohio Pyro v. Dept. of Commerce (2007) 115 Ohio St.3d 375, 385 (same quote).

This case also involves the constitutional issue regarding the denial of due process of law by a trial judge secretly informing one party to the action in writing of his decision 7 weeks before announcing his decision. State v. Ludt, 2009-Ohio-416.

If allowed to stand, these rulings will reverse fundamental decisions of the Ohio Supreme Court and the United States Supreme Court honoring the fundamental right of a litigant to have her day in court, and will further establish a dangerous precedent condoning a trial judge secretly advising one party to the action of his decision in a clandestine ex parte communication seven weeks before announcing his decision.

In short, the implications of these contrary-to law-rulings will affect a multitude of basic legal rights and cases in Ohio. Besides being legally incorrect, they are apt to prove catastrophic because they would threaten, undermine, and render uncertain long-standing and unequivocal pronouncements of the high courts of Ohio and the United States of America.

II. STATEMENT AND FACTS OF THE CASE

This appeal involves the attempted premature "adoption" by a trial court on Jan 5, 2009 - 4 days before the expiration of the appeal deadline - of a Recommendation of a child support administrative agency ("CSEA") for a *reduction-modification* of child support, attempting to usurp the constitutional due process right of the children's parental guardian to her day in court. Such attempted "adoption" without jurisdiction was made by the trial court visiting judge despite the fact the parental guardian filed for review on Jan 7, 2009 – 2 days before the expiration of the appeal deadline date specified by the Ohio legislature and CSEA for such court review, and as such "adoption" made without jurisdiction was held to usurp the children's representative's filing for review within the prescribed time period established by statute and CSEA's rules.

The initial Court Order in this case was rendered Oct 31, 2000 when the trial court awarded custody of the two minor children [Megan dob 5/21/94 and Alan dob 3/28/96] to the mother and parental guardian, and ordered the father to pay to the parental guardian child support of \$424 per child per month [total of \$848 per month], and \$900 per month spousal maintenance, and make other payments. 1

The undisputed record demonstrates the parental guardian's inability to work because of "her degenerative spinal condition with which she has suffered for over two decades." 2 The record also demonstrates that the father has earned average annual compensation in the sum of \$110,000 over the past four years, and that the only compensation earned by the parental guardian over the past nine years is the total sum of \$4,000 earned in 2008. 3 The record also demonstrates that two separate visiting judges rejected CSEA's attempts to "impute income" to the parental guardian because of her physical disabilities, and that this Court of Appeals upheld such decisions. 4 CSEA's child support reduction-modification Recommendation is based upon its continuing attempts, barred by the Doctrine of Res Judicata, to impute income to the disabled parental guardian.

On July 30, 2007 the parental guardian filed a motion to modify child support and a motion for lump-sum judgment for \$200,000+ for child support, spousal support, and other delinquent court-ordered payments. 5

The record documents that on Sept 24, 2007 the visiting trial judge initiated an oral and written ex parte conversation and written communication with CSEA's legal counsel indicating (a) that they had prior ex parte communications between themselves ["Problem with it"], and (b) informing her exactly what his decision was going to be when he rendered it seven weeks later ["Modification – Mom in Court – (Requesting): Arrearages – Judgment – Stay of Administrative Process – (Decision): No Stay – Admin Process to go Forward – 3119.63"]. 6

The parental guardian did not learn of the visiting judge's clandestine ex parte communication and conversation with CSEA's legal counsel until spring 2009 when she was inadvertently provided copies of documents from her court file.

On Nov 13, 2007, the visiting judge rendered his ex parte decision dismissing the parental guardian's motions -- exactly as he had promised CSEA's counsel he would in his ex parte communication with her seven weeks earlier - dismissing the parental guardian's motions, denying an administrative stay, and ordering the administrative process to go forward. The visiting judge ordered CSEA to proceed with an administrative child support review, just as he had promised CSEA's counsel.

CSEA conducted an administrative review on Jan 9, 2008 and *issued but did not file* with the trial court its Recommendation that the father's child support be reduced to a total of \$380 per month [\$190 per child per month]. In response, the parental guardian "respectfully demanded an administrative hearing and a court hearing under Ohio Revised Code 3119.60 et seq." for the court review of CSEA's recommendation. 7

Although CSEA *issued* its Recommendation on Jan 9, 2008, it did not *file it* until almost a year later on Dec 23, 2008. It correctly provided that a request for a court review must be filed "with the court within 14 calendar days plus 3 working days of the date this notice was mailed" which deadline fell on *Jan 9, 2009*. Ohio Revised Code 3119.63 (C) likewise specifies that for a party to exercise her right of court review of CSEA's Recommendation, she must file "no later than 14 days after receipt of the notice," which deadline also fell on *Jan 9, 2009*."

On Jan 7, 2009 [2 days before the expiration of the deadline] the parental guardian filed her Verified Chapter 3119 Objections to and Appeal from CSEA's

Recommendation [issued 1/9/2008 and filed 12/23/2008], and Motion to Dismiss Recommendation.

Thus, the parental guardian filed for court review of CSEA's reduced-modification Recommendation twice, both times within the 17-day appeal period: (a) Recommendation issued [but not filed] on Jan 9, 2008 and appeal filed Jan 23, 2008, and (b) Recommendation filed Dec 23, 2008, and appeal filed Jan 7, 2009.

On Jan 5, 2009 -- 4 days before the expiration of the appeal deadline -- the visiting judge, without jurisdiction, "adopted" CSEA's Recommendation.

The visiting judge then overruled the parental guardian's Verified Motion for Court to Vacate Judgment Entry dated Jan 5, 2009 by refusing to rule on it. Voinovich Cos. v. Marshall (1998) 81 Ohio St.3d 467.

On Jan 19, 2009 the parental guardian filed her Verified Motion for Recusal of the Visiting Judge, based upon his clandestine communication with CSEA's counsel informing her of the decision that he would render seven weeks later, and on Jan 21, 2009 the visiting judge denied her due process motion on the basis that it was "found to lack merit."

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

Lower Court Decisions Which Rule that a Party Who Files for an Appeal from an Administrative Recommendation to a Court within the Statutory Time Limit [under ORC 3119.63 (C)] Nevertheless Loses Their Constitutional Right to Their Due Process Day-In-Court If the Court Adopts the Recommendation Before the Party Files for the Appeal, Would Set Contrary-to-Law Precedent Overruling Established Principles of Statutory and Constitutional Law and Would Create Confusion and Uncertainty in Significant Areas of the Law of Ohio.

The parental guardian not only filed for her right of review within the deadline period after CSEA *issued (but did not file)* its Recommendation in Jan 2008, but additionally filed for her right of review a second time in Jan 2009 within the deadline period after CSEA *filed* its Recommendation.

Both CSEA's notice and ORC 3119.63 provide that the parental guardian exercises her right to her constitutional due process day-in-court appeal by filing for

such review by *Jan 9, 2009*. On behalf of her minor children Megan and Alan, the parental guardian filed for the children's constitutional due process review on *Jan 7, 2009*, two days before the expiration of the appeal deadline date.

The fact that the trial visiting judge attempted to adopt CSEA's Recommendation on *Jan 7, 2009*, four days before he acquired jurisdiction to do so, is legally irrelevant and directly contrary to statutory and constitutional law.

If such ruling is allowed to stand, consider the havoc that will result to the vulnerable children of Ohio who must place their trust in the courts of Ohio to assure them the child support to which they are entitled under the law of Ohio.

Proposition of Law No. 2

Lower Court Decisions Which Rule that a Trial Judge's Ex Parte Communication With One Party to Litigation, Informing that Party What His Decision Is Going to Be Several Months Before He Renders It, Does Not Create the Appearance of Unfairness Nor Constitute a Denial of Due Process, Would Set Contrary-to-Law Precedent Overruling Established Principles of Statutory and Constitutional Law and Would Create Confusion and Uncertainty in Significant Areas of the Law of Ohio.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution entitles a party to litigation to an "impartial and disinterested tribunal" and "it is an appearance of unfairness, rather than any real identifiable bias or prejudice, that appears from the record" in regards to refusal that may constitute a denial of due process of law. State v. Ludt, 2009-Ohio-416. The court found that "the appearance of unfairness, and thus, the due process air, arises from the juxtaposition of [the facts of the case regarding the judge's recusal.]" Ludt, at 27.

It is submitted that the determinative facts giving rise to the "appearance of unfairness" in this case, involving an intentional clandestine ex parte communication and written correspondence between the judge and one of the parties, constituting a denial of due process, is substantially more compelling than the determinative facts in Ludt which was reversed for denial of due process.

The lower court decisions in this case condone the obvious "appearance of unfairness" and thus the denial of constitutional due process.

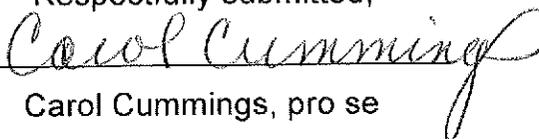
If such ruling is allowed to stand, consider the havoc that will result to the entire administration of law of such behavior which stands to deny due process of law to litigants of each and every case coming before the courts of Ohio seeking justice.

III. Summary and Conclusion

The drastic implications of these contrary-to law-rulings of the trial court and Court of Appeals will substantially and adversely affect a multitude of basic legal rights and cases in Ohio.

Besides being legally incorrect, they are apt to prove catastrophic because they would threaten, undermine, and render uncertain long-standing and unequivocal constitutional pronouncements of the high courts of Ohio and the United States of America.

Respectfully submitted,


Carol Cummings, pro se

Footnotes

1. Findings of Fact, Conclusions of Law, and Final Judgment, p. 6, filed 10/31/2000.
2. Cummings Certified Motion for Default Judgment on Her Motion for Modification of Child Support, filed 11/7/2007, p. 3, para G, and Exhibits M, N, O, P, and Q.
3. Parental Guardian's Verified Notice of Lack of Income Tax Returns in CSEA's File, Filed 3/13/2009, with attached Affidavit para #8.
4. Motion for Lump Sum Judgment, filed 7/30/2007, p. 3, para. 9; Findings of Fact, Conclusions of Law, and Judgment, filed 12/3/2002, p. 2; Court of Appeals Opinion #00-526-CA, filed 3/15/2002.
5. Motion for Modification and Motion for Lump Sum judgment, filed 7/30/2007.
6. Parental Guardia/Affiant's Verified Motion for Recusal of Judge William Martin, attached Exhibit "A," filed Aug 5, 2009; Ct of Appeals Supp. Memo of Law, pps. 1-2.
7. Parental Guardian's Chapter 319 Under-Protest Appeal from CSEA 1/0 2008 Decision Made without Jurisdiction, filed 1/23/2008.

APPENDIX

A - Court Appeals Judgment Entry in Case No. 09-HA-4

B - Court of Appeals cover letter dated 12/1/2009 to clerk of trial court re 12/2/2009 J.E.

C - Court of Appeals Opinion dated 12/2/2009 in Case No. 09-HA-4.

STATE OF OHIO
HARRISON COUNTY

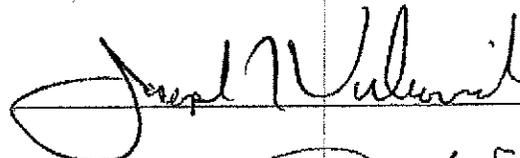
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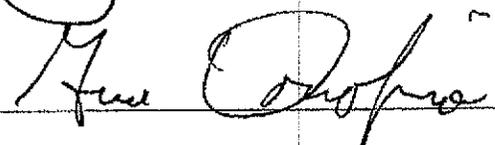
IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

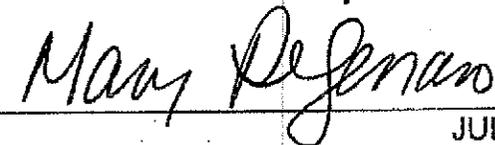
LAWRENCE TUCKOSH,
PLAINTIFF-APPELLEE,
VS.
CAROL CUMMINGS fka TUCKOSH,
DEFENDANT-APPELLANT.

)
) CASE NO. 09 HA 4
)
) JUDGMENT ENTRY
)
)
)

For the reasons stated in the opinion rendered herein, the assignments of error and the supplemental assignment of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Harrison County, Ohio is hereby affirmed. Costs taxed against appellant.







JUDGES.

"
A
"

Court of Appeals of Ohio



131 WEST FEDERAL STREET
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Seventh Appellate District

(330) 740-2180
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December 1st, 2009

Leslie Milliken
Clerk of Courts
Harrison County Courthouse
Cadiz, Ohio 43907

**RE: LAWRENCE TUCKOSH, PLAINTIFF-APPELLEE, VS.
CAROL CUMMINGS fka TUCKOSH, DEFENDANT-APPELLANT.
CASE NO. 09 HA 4**

TO THE CLERK:

By direction of the court, you are hereby authorized to enter on the docket (not journal) of this Court of Appeals the decision of this court in the above-captioned case as evidenced by the following entry:

"December 2, 2009. Judgment of the Common Pleas Court, Harrison County, Ohio is hereby affirmed. Costs taxed against appellant. See Opinion and Judgment Entry."

You are hereby authorized to file and spread upon the journal of this court the enclosed journal entry in the above-captioned case.

Very truly yours,

Renee A. Rockwood-Suri,
Judicial Secretary

Enclosures

cc (w/encl.):

Judge William Martin
Lawrence Tuckosh, *Pro se*
Carol Cummings, *Pro se*

"
v
B

STATE OF OHIO, HARRISON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

LAWRENCE TUCKOSH,)
)
 PLAINTIFF-APPELLEE,)
)
 - VS. -)
)
 CAROL CUMMINGS fka TUCKOSH,)
)
 DEFENDANT-APPELLANT.)

CASE NO. 09 HA 4
OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 98-480-DRA.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee:

Lawrence Tuckosh, *Pro se*
4101 Grasmere Run
Mason, Ohio 45140

For Defendant-Appellant:

Carol Cummings, *Pro se*
91 Maple Street #18
Oberlin, Ohio 44074

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 2, 2009

11
C

VUKOVICH, P.J.

¶(1) *Pro se* defendant-appellant Carol Cummings appeals the decision of the Harrison County Common Pleas Court modifying her child support order in the manner recommended by the Harrison County Child Support Enforcement Agency (HCCSEA). The issue in this appeal is whether Cummings properly and timely invoked her right to a hearing on HCCSEA's recommendation. For the reasons expressed below, we find that she did not properly invoke her right to hearing to review of HCCSEA's recommendation. Thus, the judgment of the trial court is affirmed.

STATEMENT OF CASE

¶(2) Cummings and Tuckosh were married in 1991 and divorced in 2000. Cummings was named the residential parent of the parties' two minor children and Tuckosh was ordered to pay child support in the amount of \$424.54 per child. In determining the amount of child support, the court did not impute any income to Cummings, who was unemployed. The divorce was appealed by both parties, however, that appeal did not affect the child support order. *Tuckosh v. Tuckosh*, 7th Dist. No. 00526CA, 2002-Ohio-1154.

¶(3) In 2007, Cummings filed a *pro se* motion, which among other things, sought to modify the child support order. In that motion, she acknowledged that HCCSEA was undergoing an administrative review of the child support order, and she requested that the review be stayed. She served this motion on Tuckosh by regular mail. Tuckosh did not respond to the motion and Cummings moved for default judgment. The trial court dismissed the motion and ordered HCCSEA to proceed with its administrative review. It explained that the motion was dismissed because Cummings had not completed service pursuant to Civ.R. 75(J) and Civ.R. 4 to 4.6, and thus, it was without jurisdiction to hear the motion. Cummings, *pro se*, then appealed the dismissal of her motion to modify child support. *Tuckosh v. Cummings*, 7th Dist No. 07HA9, 2008-Ohio-5819. In that appeal, we affirmed the trial court's decision indicating that Tuckosh was not properly served, and thus, the trial court's continuing jurisdiction was not properly invoked. *Id.*

¶{4} While that appeal was proceeding, HCCSEA proceeded with its administrative review in accordance with the trial court's order. The review was conducted on January 9, 2008, and in that review it was recommended that Tuckosh's child support obligation be lowered from \$832.42 for two children to \$379.54 for two children. It appears that in determining this, HCCSEA imputed income to Cummings.

¶{5} On December 23, 2008, HCCSEA filed a Notice of Filing, which informed the court of the results of its review and recommended that child support be lowered in accordance with the recommendation. In that filing, HCCSEA stated that it had provided Tuckosh and Cummings notice of the recommended revised amount of child support and that neither party had invoked their right to an administrative review of that recommendation in accordance with R.C. 3119.63.

¶{6} On January 5, 2009, the trial court adopted the recommendation and issued an order modifying the child support in accordance with HCCSEA's recommendation. Attached to the order was a child support worksheet which clearly shows that in determining the amount of support, income was imputed to Cummings.

¶{7} Two days later, but prior to receiving the trial court's judgment, Cummings, *pro se*, filed a motion titled "Parental Guardian's Verified Chapter 3119 Objections to and [sic] Appeal from CSEA's 1/9/08 Recommendation and Motion and Memo of Law to Dismiss Recommendation." In these objections, she makes multiple arguments, some of which are irrelevant to this appeal. The relevant arguments are her claims that she requested a timely administrative and court review of the recommendation, that she was not afforded that review, and that HCCSEA had no authority to impute income to her given previous holdings in the case. Based on those reasons, she was requesting that the trial court not adopt the recommendations.¹

¶{8} On January 20, 2009, she filed a *pro se* motion to vacate the January 5, 2009 judgment adopting HCCSEA's child support recommendation. She once again filed this motion on January 30, 2009. In both motions, she claimed that the trial court adopted HCCSEA's recommendation four days prior to acquiring jurisdiction to do so.

¹That same day she filed another motion to modify child support which was substantially similar to the one filed in 2007, however, this time it appears she served Tuckosh in the manner dictated by our 2008 opinion.

¶{9} On February 2, 2009, Cummings filed a timely notice of appeal from the trial court's January 5, 2009 judgment entry adopting HCCSEA's recommendation for child support. Cummings filed a brief raising two assignments of error, and also filed a supplemental brief raising another assignment of error.

FIRST ASSIGNMENT OF ERROR

¶{10} "THE ATTEMPTED ADOPTION BY THE TRIAL COURT OF THE CHILD SUPPORT ENFORCEMENT AGENCY RECOMMENDATION FOR MODIFICATION OF CHILD SUPPORT IS CONTRARY TO LAW BECAUSE SUCH 'ADOPTION' WAS MADE BY THE TRIAL COURT FOUR DAYS BEFORE THE FILING DEADLINE DATE FOR THE PARENTAL GUARDIAN TO REQUEST A COURT REVIEW OF CSEA'S RECOMMENDATION, AND THE PARENTAL GUARDIAN FILED FOR THE COURT REVIEW TWO DAYS BEFORE THE FILING DEADLINE DATE."

¶{11} Cummings is acting *pro se* in this appeal. She spends numerous pages of the brief on a recitation of the long history of the case between her and Tuckosh, and complaining about various rulings in this case. In her first assignment of error, she is claiming that despite HCCSEA's allegation to the contrary she did request a timely administrative hearing and court hearing on HCCSEA's January 9, 2008 recommendation for lowering child support. She claims her due process rights were violated when a hearing was not held. She further asserts that because she did timely request a hearing, the trial court was without jurisdiction to adopt the recommendation prior to the hearing. The dispositive issue in this case is whether she made a valid request for an administrative or court hearing to review the HCCSEA's recommendation.

¶{12} R.C. 3119.63 provides that in reviewing a court child support order HCCSEA must: 1) calculate a revised amount; 2) give both the obligor and obligee notice of the revised amount, their right to request an administrative hearing on the revised amount, and the procedure and time deadlines for requesting the hearing; 3) give both the obligor and obligee notice that if the court child support order contains a deviation granted under R.C. 3119.23 or R.C. 3119.24, or if either the obligor or obligee intends to request a deviation from the child support amount to be paid under the court child support order, the obligor and obligee have a right to request a court hearing on the revised amount of child support without first requesting an

administrative hearing, but in order to exercise this right the request must be made within fourteen days after receipt of notice; and 4) inform the parties that if neither party requests an administrative or court hearing within the allotted time, the revised amount will be submitted to the court for inclusion in a revised child support order. R.C. 3119.63(A)-(D). The statute further provides that if an administrative hearing is timely requested, and a hearing occurs, and at that hearing the revised child support is redetermined, HCCSEA must inform the obligor and obligee that they may request a court hearing on the redetermined revised amount. R.C. 3119.63(E). If a court hearing is not requested, then the amount is submitted to the court for inclusion in a revised child support order. R.C. 3119.63(F).

¶{13} In addition to the above statutory guidelines, the Ohio Administrative Code also provides guidelines for HCCSEA and also provides some guidance for an obligor or obligee in requesting an administrative or court hearing to review a recommendation. The Code states that a JFS 07724 form shall be used to notify each party to the child support order of each party's right to request an administrative hearing on the revised amount. Ohio Adm.Code 5101:12-60-05.5(A). That form must be submitted "to the court for inclusion in a revised support order unless either party requests an administrative adjustment hearing within fourteen days of receipt of the JFS 07724" form. Ohio Adm.Code 5101:12-60-05.5(A)(1). Besides setting time limits for the request for an administrative hearing, the Ohio Administrative Code also states that such a request must be submitted in writing to HCCSEA. Ohio Adm.Code 5101:12-60-05.6(B).

¶{14} In regard to the request for a court hearing, the Ohio Administrative Code states that each party has a right to file for a court hearing without first requesting an administrative hearing "[w]hen the existing court support order contains a deviation granted under section 3119.23 or 3119.24 of the Revised Code or when either party intends to request a deviation," and that such request must be done "no later than fourteen days of the date of receipt of the JFS 07724." Ohio Adm.Code 5101:12-60-05.5(A)(1)(a)-(b).

¶{15} Lastly, the Ohio Administrative Code explains that receipt of the JFS 07724 form is "three business days after the issuance date" for purposes of requesting either an administrative or court hearing. Ohio Adm.Code 5101:12-60-05.5(B).

¶{16} Considering the above statute and regulations, in order to determine whether Cummings' request was appropriately made, we must determine whether the request for a hearing was timely, if the request for a court hearing was made because the court child support order contained a deviation granted under R.C. 3119.23 and R.C. 3119.24, or because Cummings was requesting a deviation from the court child support order, and if the request for an administrative hearing was made in writing to HCCSEA.

¶{17} In HCCSEA's December 23, 2008 Notice of Filing, it admitted that it conducted a review of the court child support order in this case on January 9, 2008. The required JFS 07724 forms, dated January 9, 2008 and addressed to Cummings and Tuckosh, were attached to that notice and they further confirm that HCCSEA conducted its review on that date and that notices were issued that date. Thus, pursuant to the Ohio Administrative Code, this form is considered to have been received by the parties three business days after issuance. Consequently, Cummings had until January 28, 2008 to request an administrative hearing or a court hearing.

¶{18} On January 23, 2008, Cummings filed a motion titled "Parental Guardian's chapter 3119 under-protest appeal from CSEA 1/9/08 Decision Made Without Jurisdiction", in which she acknowledged notification of HCCSEA's recommended revised amount, and demanded an administrative hearing and a court hearing. She stated:

¶{19} "The parental guardian respectfully demands an administrative hearing and a court hearing under Ohio Revised Code 3119.60 et. seq. and other Ohio statutes and case law if and when the Ohio Court of Appeals and Ohio Supreme Court decide that the trial court's decision of November 13, 2007 [dismissing her motion to modify support for lack of service] and CSEA's decision of January 9, 2008 were made with jurisdiction and are not contrary to law."

¶{20} Consequently, the January 23, 2008 demand for an administrative and court hearing was timely.

¶{21} That said, the motion did not validly request a court hearing. Although it did make a request for a court hearing, the statements made in this filing do not entitle her to a court hearing prior to an administrative hearing. The original court child support order did not contain a deviation, therefore, she would only be permitted a

court hearing on HCCSEA's January 9, 2008 support recommendation if she was requesting a deviation from the court's child support order. Nowhere in the December 23, 2008 filing does she state in any manner that she intended to request a deviation.² Thus, her motion can only be construed as timely requesting an administrative hearing. However, that request is also not valid because it was not sent to HCCSEA.

¶{22} The JFS 07724 form Cummings received stated the following:

¶{23} "Your support order was established in court, therefore, your request for administrative hearing must be received within fourteen calendar plus three working days of the date in which this notice was mailed. You will be notified of the date of your hearing by regular mail. One extension of your hearing date is allowed, if you have good cause. You may bring legal counsel to the hearing.

¶{24} "Please be advised that the CSEA is not allowed to deviate from the Ohio Child Support Guidelines and must calculate support using the income and resources of the parties who are subject to the order. If the order contains a deviation granted under section 3119.23 or 3119.24 of the Revised Code or if either the obligor or obligee intends to request a deviation from the child support amount to be paid under the court child support order, the obligor or obligee has a right to request a court hearing on the revised amount of child support without first requesting an administrative hearing. In order to exercise this right, you must file your request with the court within fourteen calendar plus three working days of the date this notice was mailed.

¶{25} " * * *

¶{26} "To request hearing on this recommendation, you must submit your request in writing and submit it to the HARRISON County Child Support Enforcement Agency.

¶{27} "If you do not request a hearing or if your request for a hearing is not received within the time period mentioned in this notice as it pertains to your support order, this recommendation will result in a new support and/or health insurance order." (Emphasis in Original).

²Admittedly, Cummings did file a Motion to Modify Child Support on January 7, 2009, in which she requested a deviation. However, that motion cannot be considered a request for a court hearing on HCCSEA's recommendation because it was not filed within the time limit, and because it does not request a hearing based on HCCSEA's recommendation.

¶{28} This notice clearly indicates that the request for a hearing must be sent to HCCSEA. Here, the request was made in a motion filed with the clerk of courts. The motion's certificate of service does aver that it was sent by regular mail to "CSEA attorney Rhonda Greenwood, Asst. Harrison County Prosecutor, 111 W. Warren St., Cadiz Ohio 43907." Nothing in the above rules require any type of particular service, such as certified mail, ordinary mail, or personal service. Thus, mailing by ordinary mail was sufficient, if the address it was sent to was HCCSEA's address.

¶{29} Civ.R. 5(B) stated that service by ordinary mail can be made by mailing it to the last known address of the party to be served. Attorney Greenwood, on behalf of HCCSEA is the attorney who filed the Notice of Filing with the trial court. Her address listed on that filing is, "Attorney for Harrison County CSEA, 538 North Main Street – Suite E, P.O. Box 273, Cadiz, Ohio 43907." Likewise, on the JFS 07724 form it states that HCCSEA's address is "538 N. Main St., Suite E, P.O. Box 273, Cadiz, Ohio 43907." As shown above, the address that Cummings sent the demand to was Harrison County Prosecutor's Office at 111 W. Warren St., Cadiz, Ohio 43907, not HCCSEA at the Main St. address. As such, the demand for a hearing was not properly sent to HCCSEA.

¶{30} Furthermore, nothing in the record suggests that Attorney Greenwood and/or HCCSEA had notice of the request. The memorandum attached to the December 23, 2008 Notice of Filing stated, "Neither the Defendant, Carol Cummings, * * * requested an administrative hearing on the revised amount of child support or otherwise." 12/23/08 Motion.

¶{31} Since the requests for an administrative hearing and court hearing were not in conformity with the requirements in the statute and regulations, pursuant to R.C. 3119.63(B) and (D), HCCSEA could seek to have its recommendation included in a new child support order. Furthermore, the trial court was within its statutory right to adopt the recommendation. Consequently, for all the above reasons, this assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

¶{32} "JUDGE MARTIN'S OVERRULING OF THE PARENTAL GUARDIAN'S MOTION TO VACATE JUDGMENT IS CONTRARY TO LAW AND MUST BE REVERSED."

¶{33} In Cummings' *pro se* motion to vacate, she does not cite to any rule or case law to support her position that the trial court's January 5, 2009 decision should be vacated. It appears that her motion is not premised on Civ.R. 60(B), but rather on the inherent authority of the court to vacate a judgment; she argues that the trial court was without jurisdiction to adopt HCCSEA's recommendation to lower child support because she properly invoked her right to an administrative hearing.

¶{34} Regardless of her basis for the motion to vacate, we cannot rule on this assignment of error because the motion to vacate was never decided by the trial court, and thus, there is no ruling for this court to review. Cummings seems to assert that the trial court's failure to rule on the motion deems it overruled. While that may be the case in some instances, here the motion to vacate was filed on January 20, 2009 and then again on January 30, 2009 and the notice of appeal was filed February 2, 2009. The notice of appeal relieved the trial court of jurisdiction to decide the motion. *Daolla v. Franciscan Health System*, 79 Ohio St.3d 98, 1997-Ohio-402; *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, at ¶ 11. Thus, the trial court was provided with thirteen days to decide the motion. Failing to decide a motion in thirteen days does not deem the motion overruled because of inaction. Consequently, as there is no ruling to review, this assignment of error is not ripe for review.

SUPPLEMENTAL ASSIGNMENT OF ERROR

¶{35} "THE TRIAL JUDGE'S EX PARTE COMMUNICATION WITH CSEA'S LEGAL COUNSEL INDICATING THAT THEY HAD HAD PRIOR EX PARTE COMMUNICATION BETWEEN THEMSELVES AND THE TRIAL JUDGE INFORMING CSEA'S LEGAL COUNSEL WHAT HIS DECISION WAS GOING TO BE SEVEN WEEKS BEFORE HE RENDERED IT, AND OTHER FACTS IN REGARD TO HIS DECISIONS, CREATE THE APPEARANCE OF UNFAIRNESS AND THUS CONSTITUTE A DENIAL OF DUE PROCESS."

¶{36} Three months after filing her brief, Cummings, without court approval, filed a supplemental brief with a supplemental assignment of error asserting that her due process rights were violated when an *ex parte* communication occurred between the trial court and HCCSEA on September 24, 2007. Since Cummings did not request leave to file a supplemental brief, we are not required to consider her supplemental argument. However, even if we considered it, it lacks merit for two reasons.

¶{37} First, any alleged error should have been raised in the prior appeal. The supplemental brief clearly indicates that the alleged improper communication occurred on September 24, 2007, when the trial court allegedly informed legal counsel from HCCSEA that it was going to deny Cummings' July 30, 2007 Motion to Modify Child Support and order HCCSEA to proceed with its administrative review. That decision was rendered on November 13, 2007 and Cummings appealed that decision in *Tuckosh v. Cummings*, 7th Dist No. 07HA9, 2008-Ohio-5819. Thus, any argument that ex parte communication occurred, which divulged the court's November 13, 2007 decision prior to its issuance, is barred by res judicata because it could have and should have been raised in the earlier appeal. *Boardman Canfield Center, Inc. v. Baer*, 7th Dist. No. 06MA80, 2007-Ohio-2609, ¶18.

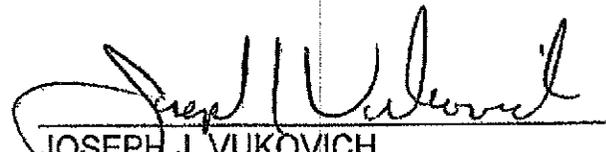
¶{38} Second, the record contains no support for her allegation that the trial court and legal counsel from HCCSEA had improper ex parte communications on September 24, 2007. Cummings attaches a phone message as an exhibit to her brief which she contends is evidence of the improper communication. The record before this court, however, does not contain that phone message. Thus, for the above reasons, even if the supplemental argument is considered, it has no merit.

CONCLUSION

¶{39} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.

APPROVED:



JOSEPH J. VUKOVICH,
PRESIDING JUDGE