[Cite as *Tuckosh v. Cummings*, 2009-Ohio-6401.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LAWRENCE TUCKOSH,	)	
	)	CASE NO. 09 HA 4
PLAINTIFF-APPELLEE,	)	
	)	
- VS. -	)	O P I N I O N
	)	
CAROL CUMMINGS fka TUCKOSH,	)	
	)	
DEFENDANT-APPELLANT.	)	

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

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.

¶{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.

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[1]That 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.

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. No where in the December 23, 2008 filing does she state in any manner that she intended to request a deviation.[2]

[2]Admittedly, 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

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).

¶{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,

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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.

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, 3009 and the notice of appeal was filed February 2, 2009. The notice of appeal relieved the trial court of jurisdiction to decide the motion. *Daolia 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.