IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DLE,	: NO. 91-21,866
Petitioner	:
	:
vs.	: DOMESTIC RELATIONS SECTION
	: Exceptions
JME, SR.,	:
Respondent	:

OPINION AND ORDER

Before the Court are Petitioner's exceptions to the Family Court Order dated October 1, 2002, in which Respondent was directed to pay child support to Petitioner. Argument on the exceptions was heard February 26, 2003.

In her exceptions, Petitioner contends the hearing officer erred in basing Respondent's child support obligation on his unemployment compensation rather than assessing him an earning capacity, in finding that Petitioner failed to notify Domestics regarding the discontinuation of her child care expense, in vacating the child care expense retroactive to May 15, 2001, and in relying on a wage verification which was not made part of the record.[1]

With respect to the issue of Respondent's earning capacity, a review of the transcript indicates that Respondent was fired from his previous employment with AT&T as a direct result of excessive absence. His immediate supervisor testified that he had missed 16 days in 11 occurrences over the previous 12-month time frame and that he was fired for that cumulative absenteeism, and not for the most recent absence. Much appears to have been made of the alleged medical excuse for the most

[1] Petitioner raises additional exceptions but these are either cumulative or as a direct result of errors alleged in previous exceptions.

recent absence but since Respondent's supervisor indicated that that absence was not the sole reason for the termination, the Court believes it unnecessary to give much consideration to such testimony. Respondent testified in October 2002 that he had looked for work at four to five places, two on the day of the hearing, since he had been fired in April 2002. Considering all of this evidence, the Court believes that an assessment of an earning capacity, rather than basing Respondent's obligation on his unemployment compensation, would have been appropriate. Since Respondent had filed the Petition for review, indicating he had lost his job and seeking a reduction, it would have been appropriate for the hearing officer to simply dismiss that request for review and continue his obligation based upon his previous employment and the income therefrom. The Court will therefore recalculate Respondent's support obligation based upon the income utilized in the prior Order, which considered both his income from employment at AT&T as well as a tax refund, of $2,193.00 per month.

The Court notes that although not raised in exceptions, it appears Petitioner should have been assessed an earning capacity as well and at argument, Petitioner's counsel agreed. The testimony presented in Family Court indicated that Petitioner is not currently working, that she was layed off from her employment in May 2001 but that she chooses to stay home at this time and is not seeking employment. Although Petitioner earned $18,000.00 per year at her most recent employment, she also testified that was the highest income she had experienced, previously earning $6.75 per hour, $6.55 per hour, and minimum wage. The Court will assess her an earning capacity of $6.75 per hour, or an annual gross income of $14,040.00. According to her 2001 income tax return, she would pay no federal tax and indeed would receive an earned income credit. Subtracting state taxes, local taxes and social security taxes, Petitioner would have an annual net income of $12,327.00. Adding an earned income credit of $3,811.00, Petitioner would have a total annual income of $16,138.00, for a monthly net income of $1,344.83.

Considering Petitioner's income of $1,345.00 and Respondent's income of $2,193.00, the guidelines suggest a payment for the support of four minor children of $823.71 per month. Considering Respondent's wife's income of $2,549.00 per month and Respondent's income of $2,193.00 per month, the guidelines suggest a payment for the support of two minor children in the amount of $594.31 per month. As the total of these two obligations exceeds 50% of Respondent's

monthly net income, his obligation to Petitioner must be reduced proportionately. Doing so results in an obligation of $636.94 per month.

With respect to Petitioner's contention the hearing officer erred in vacating her childcare expense retroactive to May 2001, again the Court agrees. While the hearing officer was justified in finding that Petitioner no longer has a child care expense, there was absolutely no evidence to indicate that Petitioner failed to notify the Domestic Relations Office or Respondent of the termination of her child care expense, and therefore no basis upon which to retroactively vacate the contribution. Respondent's Petition for Modification indicated as a basis for review, not only his loss of income from employment, but also Petitioner no longer had a child care expense. Respondent presented no evidence that he was prevented from filing such a Petition any sooner than he actually did. The Court will therefore vacate that portion of the Family Court Order which retroactively vacated the childcare contribution.

With respect to the hearing officer's reliance on a wage verification which Petitioner indicates was not part of the record, since that wage verification supported the hearing officer's finding that Petitioner left her previous employment on May 14, 2001, which finding contributed to the retroactive vacation of the child care contribution and since this Court is reinstating the child care contribution back to the date of Respondent's Petition, this exception is deemed moot.

Finally, the Court notes that although the percentage contribution to medical expenses changes slightly with this Court's findings of income, the previous calculation of Respondent's obligation toward the total orthodontic expense is only minimally different and the Court will not require the Domestic Relations Office to make any adjustments in that regard.

ORDER

AND NOW, this 5th day of March, 2003, for the foregoing reasons, Petitioner's exceptions are hereby granted in part. The Order dated October 1, 2002 is hereby modified to provide for a payment of child support for the support of the parties' four minor children of $636.94 per month effective May 1, 2002. Respondent shall be responsible for 61.98% of all excess unreimbursed medical expenses and Petitioner shall be responsible for 38.02% of such. The Order of October 1, 2002 is also modified such that the childcare contribution shall be vacated effective May 1, 2002, rather than May 15, 2001.

As modified herein, the Order of October 1, 2002 is hereby affirmed.

By the Court,

Dudley N. Anderson, Judge

cc: Family Court
Domestic Relations
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Hon. Dudley N. Anderson