

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 10-134

Complainants: No. 1394000543A

Judge: No. 1394000543B

ORDER

The complainant alleged that a superior court judge did not give him an opportunity to be heard. After reviewing the judge's response, the commission found no evidence of misconduct on the part of the judge. The complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: September 8, 2010.

FOR THE COMMISSION

/s/ Keith Stott

Executive Director

Copies of this order were mailed to the complainant and the judge on September 8, 2010.

This order may not be used as a basis for disqualification of a judge.

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COPY

MAR - 4 2010



MICHAEL E. JEANES, CLERK
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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 7 IN AND FOR THE COUNTY OF MARICOPA

8 In re the Matter of:

9 CASE #:DR1994-005048

10 Petitioner,

**MOTION TO RECONSIDER AND
 VACATE ORDER FILED ON
 FEBRUARY 3, 2010 AND REQUEST
 FOR HEARING**

11 and

13 Respondent.

15 COMES NOW, Petitioner through counsel undersigned, does hereby move this Court to
 16 reconsider and vacate the order entered by Judge Pro Tem signed February 3, 2010,
 17 and set a hearing to determine if Petitioner's child support obligation should remain at the
 18 temporary modified amount of \$204.48 per month. This Motion is supported by the following
 19 memorandum of points and authorities and exhibits attached hereto and hereby incorporated
 20 herein by this reference.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. FACTUAL BACKGROUND**

23 On or about April 21, 2009, Petitioner (hereinafter "Petitioner"), on his own
 24 behalf, filed a Petition to Modify Child Support. The Court issued an Order to Appear and a
 25 Hearing was set for August 4, 2009. The Court based upon Petitioner's filing, testimony and
 26 evidence of his unemployment and medical condition (See Exhibit "A") issued an order

CONFORMED

1 temporarily modifying Petitioner's child support obligation to \$204.00 per month, commencing
2 July 1, 2009. The Court also set a Review Hearing for November 3, 21009 (See exhibit "B").

3 The Court, per its prior order, held a Review Hearing on November 3, 2009, at which the
4 Petitioner appeared via telephone as he resides out of state. The Court found there was a
5 substantial and continuing change in circumstances as the Petitioner remained unemployed, and
6 ordered that Petitioner's child support obligation at \$204.48 per month, effective December 1,
7 2009. The Court also set a Review Hearing for February 2, 2010, for the purpose of reviewing
8 the employment status of obligor, determining if the order need to be modified, and to determine
9 if the obligor applied for SSD. The Court also ordered that payment on arrears shall not increase
10 without Court order (See Exhibit "C").

11 The Court, per its prior order, held a Review Hearing on February 2, 2010, presided by
12 Judge Pro Tem The Petitioner attempted to call into the Court at the scheduled time,
13 but was unable to reach the Court. The Petitioner, in the days that followed the hearing,
14 contacted the Court and attempted to advise the Court as to what happened on February 2, 2010.
15 Petitioner was advised the Court had issued a default judgment.

16 According to Court records, Judge Pro tem held the aforementioned Hearing in
17 this matter on February 2, 2010. Based upon the Modification Judgment and Order prepared by
18 the Attorney General's office, and the Court's Minute Entry filed on February 17, 2010, the
19 Court despite the fact Petitioner was unable to reach the Court or Judge Pro Tem ordered a
20 modification of Petitioner's support obligation to \$756.00 per month, and attributed income of
21 \$5,000.00 per month to Petitioner. The Court further *sua sponte*, and against Arizona law, made
22 the aforementioned modification of child support retroactive to July 1, 2009. It should be noted
23 that Judge Pro Tem had no evidence that Petitioner was employed, nor does it appear that
24 any evidence was presented that Petitioner was earning \$5,000.00 per month (See Exhibit "D").

25 Upon becoming aware of Judge Pro Tem orders, Petitioner contacted the
26 undersigned on February 17, 2010, to discuss his options in regards to the aforementioned orders.

1 The Petitioner has been adement that his failure to be connected to the Court on February 2, 2010
2 was an error, and has been attempting to correct the same since. Petitioner has advised the
3 undersigned that he is currently unemployed and attempting to regain his nursing license in an
4 effort to begin seeking employment. As the Court is aware, Petitioner has been suffering from
5 serve depression, and is only now emerging from said depression. Petitioner is attempting to
6 rebuild his life and become employable. Petitioner was denied his due process rights during the
7 February 2, 2010 hearing, and Judge Pro Tem went beyond the scope of the hearing and
8 issued orders without sufficient evidence or providing Petitioner an opportunity to be heard.
9 Therefore, Petitioner now files this Motion to Vacate the orders issued by Judge Pro Tem
10 and have a hearing set on this matter to address the issues which were to be address at said
11 hearing, per Commissioner Albrecht's order of November 5, 2009.

12 II. ARGUMENT

13 The Court on February 2, 2010, per the Court's order of November 5, 2010, was to hold a
14 Review Hearing to determine Petitioner's employment status, and if the Petitioner had applied
15 for SSD. Due to a mistake Petitioner was not patched into the Courtroom for the Hearing.
16 Petitioner should not have to bear such a severe penalty, which is not based in evidence and/or
17 law due to a mistake and/or error.

18 It appears based upon nothing more than unsupported argument by Carol Park an attorney
19 for the State with no supporting evidence, convinced Judge Pro Tem to violate Petitioner's
20 due process rights and issue orders without Petitioner being aware of the action, or having an
21 opportunity to be heard. Further, Judge Pro Tem in violation of Arizona law, modified
22 Petitioner's child support obligation retroactive to July 1, 2009, A.R.S. §25-327. Judge Pro Tem
23 actions are not supported by the facts nor law.

24 As the Hearing set on February 2, 2010 was a Review Hearing regarding Petitioner's
25 employment status and medical condition, even if Petitioner's failure to appear was not in error,
26 Judge Pro Tem orders violated Petitioner's due process rights. In order to maintain a
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1 procedural due process claim under the Fourteenth Amendment to the United States Constitution,
2 the Plaintiff must establish that it had a liberty or property interest protected by the Constitution.
3 Aegis of Arizona, L.L.C. v. The Town of Marana, 81 P3d 1016, ¶44, 415 Ariz.Adv.Rep. 10
4 (App. 2003). "A protected property interest is present where an individual has a reasonable
5 expectation of entitlement deriving from 'existing rules or understanding that stem from an
6 independent source such as state law'" Id. At ¶45 (quoting Wedges/Ledges of California, Inc., v.
7 City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994)). The elements of procedural due process are
8 notice and an opportunity to be heard. Iphaar v. The Industrial Commission of Arizona, 171
9 Ariz. 423, 425, 831 P.2d 422, 426 (App. 1992). The type of notice that due process requires is
10 "that which is reasonably calculated under all of the circumstances to apprise interested parties of
11 the pendency of the action and affords them an opportunity to present their objections." Id. At
12 425, 831 P.2d at 426. In the present case, Petitioner did not have notice which was reasonably
13 calculated to afford him an opportunity to present his objection to the State seeking to retro-
14 modify his child support obligation, or attribute Petitioner's income at \$5,000.00 per month.
15 Again, it must be noted that no evidence was presented that Petitioner was earning nor could earn
16 \$5,000.00 per month in income.

17 Therefore, since the Petitioner's non appearance at the Hearing on February 2, 2010 was
18 by mistake, inadvertence and/or error and Judge Pro Tem improperly issued orders at said
19 hearing, the order issued by Judge Pro Tem on February 3, 2010 must be vacated, and a
20 Hearing set in this matter to address the issues which were to be addressed at the Hearing on
21 February 2, 2010.

22 DATED this 4 day of March, 2010.
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