[Cite as *Tuscarawas Cty. CSEA v. Burger*, 2001-Ohio-1440]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
TUSCARAWAS COUNTY CSEA	:	**Hon. Julie A. Edwards, P. J.**
	:	**Hon. W. Scott Gwin, J.**
Appellant	:	**Hon. John W. Wise, J.**
	:	
-vs-	:	**Case Nos. 2000AP120093,**
	:	**2000AP110074, 2000AP110086,**
	:	**2000AP110075, 2000AP110087,**
	:	**2000AP110076, 2000AP110088,**
MARK BURGER, et al.	:	**2000AP110078, 2000AP110089,**
	:	**2000AP110079, 2000AP110090,**
	:	**2000AP110084, 2000AP110091,**
	:	**2000AP110085 and 2000AP110092**
	:	
Appellees	:	**O P I N I O N**

CHARACTER OF PROCEEDING: Civil Appeals from the Tuscarawas Court of Common Pleas, Case Nos. 1988DS050217, 1993TC080371, 1997DC070347, 1989DS090417, 1990DS010018, 1997DC020084, DR49710, 1994TC050228, 1984DR010032, DR51203, 1986DV120541, 1985DR080393, 1993DC050219, 1996DC050205, 1994DC030099

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: September 26, 2001

APPEARANCES:

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Wise, J.

Appellant Tuscarawas County Child Support Enforcement Agency ("CSEA") brings a consolidated appeal, following post-decree decisions by the Tuscarawas County Court of Common Pleas in fifteen separate divorce and dissolution cases, regarding the collection of certain child support processing fees. The relevant facts leading to this appeal are as follows.

In each of the cases presently under appeal, a non-custodial parent is the obligor under a child support order. At various times, CSEA reviewed the status of each case and thereupon, either issued administrative findings or else pursued a contempt action against the obligor. In the cases involving administrative review, the administrative findings were submitted for review or adoption by the court. In the contempt actions, the cases were directly set for court review. Each contempt case was thereupon reviewed by a magistrate, leading to a decision as per Civ.R. 53.[1] The trial court thereafter substantially adopted the findings of the respective magistrate's decisions, in some cases despite Civ.R. 53 objections filed by CSEA. In all instances the trial court further ordered an additional monthly payment toward

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[1] **One of the "contempt" cases technically came before the trial court as a motion for imposition of sentence. Two others were arrearage determinations only.**

arrearages, but ultimately declared in each that CSEA could not collect processing fees on any support arrearage payments, including those attributable to prior unpaid processing fees. The trial court specifically utilized the following language in several of the cases:

> **Thus, the Court finds that although the Revised Code gives the court and administrative agency authority to account for past due processing fees, neither the Revised Code nor the O.A.C. authorizes the collection of an additional processing fee on the past due processing fee. The Court finds that the law does not allow for cumulative processing fees to be charged upon past due support. The accumulation of processing fees could result in an unconscionable, exponential obligation for which there is no clear legislative intent and which this court will not endorse.**

Judgment Entries, varying pagination.

CSEA timely appealed the fifteen judgment entries and herein raises the following sole Assignment of Error in each case:

> **I. THE TRIAL COURT ERRED IN HOLDING THAT OHIO REVISED CODE SECTION 2301.35(G) DOES NOT AUTHORIZE THE IMPOSITION OF A TWO PERCENT (2%) PROCESSING CHARGE ON ARREARAGE PAYMENTS[.]**

Appellant CSEA argues that the trial court erred in negating the imposition of statutory processing charges on monthly arrearage payments. We agree.

Former R.C. 2301.35(G) provided[2] the framework for the collection of child support processing fees as follows:

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[2] The statute in question was repealed effective March 22, 2001, after the decisions were rendered in the cases *sub judice*. Processing fees are presently addressed in R.C. 3119.27.

> **(G)(1) A court or administrative agency that issues or modifies a support order shall impose a processing charge that is the greater of two per cent of the support payment to be collected under a support order or one dollar per month on the obligor under the support order. The obligor shall pay the amount with every current support payment, and with every payment on arrearages. No court or agency may call the charge a poundage fee.**

Following its review of various provisions in the Ohio Revised Code and Ohio Administrative Code, the trial court found that it could not locate a definition of "arrearages" as used in 2301.35(G)(1). However, the court concluded that "[t]he obligor must pay the processing charge on the support, whether the support is paid on time (current) or paid late (past-due);" but that no authority exists for assessing a "second" processing fee on the support amount if paid past-due. Judgment Entries, varying pagination.

Courts are guided by the axiom that statutes should be construed to avoid unreasonable consequences. See *State ex rel. Dispatch Printing v. Wells* (1985), 18 Ohio St.3d 382, 384. The trial court's reading of R.C. 2301.35(G)(1) effectively altered the second sentence from conjunctive to disjunctive; *i.e.*, the phrase "and with every payment on arrearages" was essentially construed as "*or* with every payment on arrearages," (if not previously paid with current support.) Generally, " * we must presume the legislature means what it says; we cannot amend statutes to provide what we consider a more logical result." *State v. Virasayachack* (2000), 138 Ohio App.3d 570, 574. Additionally, the trial court effectively read "two per cent of the support payment" in the first sentence of R.C. 2301.35(G)(1) as referring to a current support order only. In construing a statute, a court may not add or delete words.**

***State ex rel. Sears, Roebuck & Co. v. Indus. Comm*. (1990), 52 Ohio St.3d 144, 148; *State v. Hughes* (1999), 86 Ohio St.3d 424, 427. As CSEA points out, the aforementioned second sentence of R.C. 2301.35(G)(1) was originally added to the statute, via amendment, on March 29, 1988. Although the second sentence has from its onset contained the phrase "current support," the General Assembly never chose to amend "support payment" or "support order" from the first sentence in like fashion. Indeed, at least one appellate court has held that a "child support order" includes an order requiring periodic payments for past-due support. See *Treadway v. Ballew* (Oct. 7, 1998), Summit App.No. 18984, unreported.**

Furthermore, at the time of the cases *sub judice*, the Ohio Department of Job and Family Services ("ODJFS") was statutorily charged in R.C. 5101.325(B)(1)[3] with maintaining an account of unpaid processing fees for every child support obligor:

> **(B)(1) The division [of child support in the department of job and family services] shall collect the charge imposed on the obligor under the support order pursuant to division (G)(1) of section 2301.35 of the Revised Code. If an obligor fails to pay the required amount with each current support payment due in increments specified under the support order, the division shall maintain a separate arrearage account of that amount for that obligor. ***.**

Reading R.C. 5101.325(B)(1) and R.C. 2301.35(G)(1) *in pari materia*, we cannot accept the trial court's restrictive interpretation of the collection of processing fees. An obligor who fails to pay current support remains statutorily liable for the corresponding accumulation of unpaid processing fees on said support; otherwise,

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[3] **The statute in question was also repealed effective March 22, 2001. But cf.**

the mandate of R.C. 5101.325(B)(1) is superfluous. When the obligor later makes an arrearage payment, we find no basis to bar CSEA from assessing thereon a separate processing fee under R.C. 2301.35(G)(1) . The purpose of a processing fee is to compensate officials for the risk of handling and disbursing money. See *Granzow v. Bureau of Support* (1990), 54 Ohio St.3d 35, 38. This risk is multiplied when a non-paying obligor forces CSEA to use its resources and personnel to keep a case open until the arrearage is exhausted, even if years after emancipation of the subject child.

Moreover, when interpreting statutes, courts " * * * must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise and to which the General Assembly has delegated the responsibility of implementing the legislative command." *Swallow v. Indus. Comm.* (1988), 36 Ohio St.3d 55, 57. In that vein, CSEA counsel indicated the following in response to an inquiry by the trial court judge:

> **THE COURT: In the statute, now you actually accumulate a two percent-well, let me just turn the wheels back of time a little bit. When I was practicing law, we had a–when someone had an accumulated arrearage, we had, you know, my client would pay a current support payment plus the processing**

R.C. 3121.58.

> **fee plus a certain amount due on the arrearage and there was not a two percent charge then on that. If it was like fifty dollars a month, there was not a two percent charged on that. What has changed to bring about this additional two percent? I'm assuming what you're saying now is that now we're allowed to charge two percent on that extra fifty dollars a month?**
>
> **MS. SCHURER: Actually, we've been allowed to do it since 1993, but this county chose not to do it. Their old computer system did not do it and they never changed over to actually show on their payment records that they would carry it so they've never actually charged it. Now that we are basically being-now that SETS is implemented and everything is centralized in Columbus, it necessitates all eighty-eight counties to be charging the same exact way so now all eighty-eight counties are charging two percent on your current and two percent on your arrearage payments just basically because you shall under the statute and that's the part that's keeping all eighty-eight counties uniform.**

Tr., Cases DR 51203, 1984 DR 010032, DR 49710, 1994 TC 050228, at 4.

CSEA counsel's above statements comport with the language of R.C. 5101.322(A) (presently recodified as R.C. 3125.07), which mandates that "[t]he [state] department of job and family services shall establish and maintain a statewide, automated data processing system * to support the enforcement of child support that shall be implemented in every county." We find the trial court failed to give proper deference to ODJFS's interpretation of 2301.35(G)(1), and in so doing put the**

Tuscarawas County CSEA in the untenable position of handling payments contrary to the General Assembly's intended uniform structure of the Support Enforcement Tracking System ("SETS"). See, also, Section 654, Title 42, U.S. Code: ("A State plan for child and spousal support must * * * provide that it shall be in effect in all political subdivisions of the State * * *.")

We therefore hold the trial court erred in disallowing the collection of statutory processing charges on monthly arrearage payments. CSEA's sole Assignment of Error in each case is sustained.

For the foregoing reasons, the judgments of the Court of Common Pleas of Tuscarawas County, Ohio, are reversed, and the causes are remanded to that court for further proceedings consistent with this opinion.

By: Wise, J.

Gwin, J., concurs.

Edwards, P. J., dissents.

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JUDGES

JWW/d 727

EDWARDS, P.J., DISSENTING OPINION

I respectfully dissent from the majority as to its analysis and disposition of the sole assignment of error.

Former R.C. 2301.35(G) stated:[4]

> **(G)(1) A court or administrative agency that issues or modifies a support order shall impose a processing charge that is the greater of two per cent of the support payment to be collected under a support order or one dollar per month on the obligor under the support order. The obligor shall pay the amount with every current support payment, and with every payment on arrearages. No court agency may call the charge a poundage fee.**

I agree with the trial court's analysis of this language as set forth in its entry of November 22, 2000. That analysis is that the first sentence of R. C. 2301.35(G)(1) defines the authority of the court and the administrative agency. The court or the administrative agency imposes the processing charge. The second sentence conveys no authority to impose a processing fee but rather sets forth the obligor's responsibility to pay the fee and when to pay it.

Therefore, the analysis of how to calculate the processing fee must center on the first sentence of R. C. 2301.35(G)(1). That sentence states that the processing charge shall be (in most cases) two per cent of the *support payment to be collected under a support order.* (Emphasis added.) The issue is whether the "support

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[4] This statute was repealed effective March 22, 2001, after the decisions in the cases *sub judice*. Processing fees are now addressed in R. C. 3119.27 and 3119.28.

payment to be collected under a support order" includes an order to pay on arrearages as well as an order to pay current support. An example will illustrate the difference in outcome. If support is $200.00 per month, the processing fee is $4.00. That fee is imposed, per the statute, even if the current support payment is not paid by the obligor. Therefore, if the obligor fails to pay the $200.00, the obligor now owes $200.00 plus $4.00. (The $4.00 is segregated and an accounting kept. It is clearly not support.) If the court now orders the obligor to pay off the $200.00 support arrearage in four monthly installments of $50.00 each, then the obligor should pay $200.00 plus $50.00 per month for four months. If the processing fee is imposed on the arrearage amount, pursuant to the argument that the arrearage order is a support payment to be collected under a support order, then the processing fee would be $5.00 in each of the four months. The obligor would also still owe the original $4.00 processing fee.

If the processing fee is only imposed on the current support payment, the obligor would owe $4.00 in processing fees for the first missed support payment and a $4.00 processing fee in each of the months that the obligor was ordered to pay $200.00 in support and $50.00 in arrearages. In other words, the processing fee of two per cent would only ever be imposed on the current support payment. It would be collected when the obligor actually made a payment. Under this interpretation of the statute, the obligor would only need to pay a two per cent fee with every payment, whether it be for current support or for arrearages, to pay off the processing fees. In the example set forth above, that would mean that the obligor

would pay a $4.00 processing charge on his/her $200.00 current support payment and a $1.00 processing charge on his/her $50.00 arrearage payment. The $1.00 processing charge on the arrearage payment would be credited against the $4.00 processing charge arrearage that was imposed when the $200.00 current payment was not made.

I would find that the correct interpretation of R. C. 2301.35(G)(1) is that the two per cent can only be imposed on the current support payment and not on the arrearage payment. I reach this conclusion by reading R. C. 2301.35(G)(1) *in pari materia* with the former R. C. 5101.325(B)(1).[5] R.C. 5101.325(B)(1) charged the Ohio Department of Job and Family Services with maintaining an account for unpaid processing fees for each obligor:

> **(B)(1) The division [of child support in the department of job and family services] shall collect the charge imposed on the obligor under the support order pursuant to division (G)(1) of section 2301.35 of the Revised Codes. If an obligor fails to pay the required amount with each *current support payment* due in increments specified under the support order, the division shall maintain a separate arrearage account of that amount for that obligor....(Emphasis added.)**

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[5] As noted by the majority, this statute was repealed effective March 22, 2001. But cf. R. C. 3121.58.

Pursuant to R. C. 2301.35(J)(1), "current support payment", as used in that section, means the amount of support due an obligee that an obligor is required to pay in a particular payment for the current month as specified in a support order. And, specifically, "current support payment" does not include payments on arrearages under the support order.[6] It appears from a reading of 5101.325(B)(1) that processing fee arrearages accumulate *only* when the fee is not paid on the *current support payment.* R. C. 5101.325(B)(1) does not say that processing fee arrearages accumulate when the fee is not paid on arrearage payments. Therefore, in reading the statutes together, I find that there was no intention by the legislature to impose a processing fee on the arrearage portion of a support order.

"Support order" was defined in R. C. 2301.34[7] as an order requiring payment of support issued pursuant to section 2151.23, 2151.231 [2151.23.1], 2151.232 [2151.23.2], 2151.33, 2151.36, 2151.49, 3105.18, 3105.21, 3109.05, 3109.19, 3111.13, 3111.20, 3111.211 [3111.21.1], 3111.22, 3113.04, 3113.07, 3113.31, or 3115.31 of the Revised Code. The code sections cited generally deal with the issuance and modification of child and/or spousal support orders in custody, divorce, domestic violence and parentage cases and in criminal cases as a condition of suspended sentences. These code sections do not generally address the issuance of orders on arrearages. However, "support order" is used in many contexts in the Revised Code where an ordered payment on arrearages would, by common sense, be included in

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[6] As of March 22, 2001, R. C. 2301.35 was repealed. The language that previously was in R. C. 2301.35(G)(1) is now in R. C. 3119.28.

[7] Repealed 3/22/01. Similar language is now in R. C. 3119.01(B)(2) and (5) and (C)(2) and (3).

the definition of support order. So, I do not rely on a strict reading of R. C. 2301.34(B) for my conclusion. I rely instead on a reading of the statutes *in pari materia* even though I reach a conclusion contrary to the majority, who also interpreted the statutes *in pari materia.*

I would affirm the decision of the trial court.

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Judge Julie A. Edwards, P.J.

[Cite as *Tuscarawas Cty. CSEA v. Burger*, 2001-Ohio-1440]

IN THE COURT OF APPEALS FOR TUSCARAWAS, COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TUSCARAWAS COUNTY CSEA	**:**	**JUDGMENT ENTRY**
	:	
Appellant	**:**	
	:	
	:	
-vs-	**:**	**CASE NOS. 2000AP120093,**
	:	**2000AP110074, 2000AP110075,**
	:	**2000AP110076, 2000AP110078,**
	:	**2000AP110079, 2000AP110084,**
	:	**2000AP110085, 2000AP110086,**
MARK BURGER, et al.	**:**	**2000AP110087, 2000AP110088,**
	:	**2000AP110089, 2000AP110090,**
Appellees	**:**	**2000AP110091 and 2000AP110092**

For the reasons stated in our accompanying Memorandum-Opinion, the judgments of the Court of Common Pleas of Tuscarawas County, Ohio, are reversed and remanded for further proceedings consistent with this opinion.

Pursuant to App.R. 24(A)(3), appellees shall pay costs equally in this matter.

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JUDGES