

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF:)

L. A. V.)

) OAH No. 09-0662-CSS

) CSSD No. 001157053

DECISION AND ORDER

I. Introduction

This case involves the obligor L. A. V.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on November 17, 2009. The obligee child is K., who is five years old.

The hearing was held on January 4, 2010. Mr. V. appeared in person; the custodian, D. S. H., participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded. The record closed on January 15, 2010.

Based on the record and after careful consideration, Mr. V.'s ongoing child support is set at \$707 per month, effective January 1, 2010. Ms. H.' state agency clarified it is requesting ongoing support only as of January 2009, so Mr. V. is not liable for support in this administrative child support action prior to that date. The 2009 calculation of \$899 per month is affirmed. Mr. V.'s request for a variance due to financial hardship is denied.

II. Facts

A. Procedural Background

Ms. H. submitted an application for child support services via her state of residence on January 16, 2009.¹ On February 6, 2009, CSSD sent Mr. V. an Administrative Order to Provide Financial and Medical Insurance Information, which he did.² On May 20, 2009, CSSD served an Administrative Child Support and Medical Support Order on Mr. V.³ He requested an administrative review and provided additional information.⁴ On November 17, 2009, CSSD issued an Amended Administrative Child and Medical Support Order that set Mr. V.'s ongoing child support at \$899 per month, with arrears of \$20,627 for the period from November 2007

¹ Exh. 1.

² Exhs. 2-3.

³ Exh. 4.

⁴ Exhs. 5-7.

through November 2009.⁵ Mr. V. filed an appeal on December 3, 2009, asserting he cannot afford the child support amount set by CSSD because he is paying support for another child and has two younger children in the home.⁶

B. Material Facts

Mr. V. is in the military – he is an E-6 with 9 years of service.⁷ He was deployed for twelve months from November 2008 through November 2009.⁸ He has most recently been serving in Alaska, but as of March 2010, he had been transferred to North Carolina.⁹ Mr. V. will receive three weeks of airborne training (jump school) and subsequent civil affairs schooling that will last into 2011. In addition to his pay and other entitlements, he will receive jump pay of \$150 per month upon completing jump school.

Mr. V.'s 2009 base pay, on an annual basis, totaled \$35,409.81.¹⁰ In addition, on a monthly basis he received Basic Allowance for Subsistence (BAS) of \$323.87; Basic Allowance for Housing (BAH) of \$1,961; and Cost of Living Allowance (COLA) of \$583.67.¹¹ Thus, all of his wages and entitlements total \$69,832.03 for 2009 and when the PFD is added, Mr. V.'s total annual income equals \$71,137.03.¹² When inserted into CSSD's online child support calculator, this income figure yields a support amount of \$899 per month.¹³

After Mr. V.'s move to North Carolina, his total wages for the year are estimated to be \$40,883.40, including the PFD and his jump pay.¹⁴ His non-income pay for 2010 is estimated at \$19,366.44, which is lower than it was in 2009 because he will no longer receive a COLA payment and his BAH will be lower, at \$1,290 per month.¹⁵ All of these wages and non-pay entitlements total \$60,249.84, which yields a child support amount of \$707 per month from CSSD's online child support calculator.¹⁶

⁵ Exh. 8 at pgs. 1-2.

⁶ Exh. 9.

⁷ Exh. 13.

⁸ Testimony of Mr. V.

⁹ Exh. 15.

¹⁰ Exh. 8 at pg. 9.

¹¹ *Id.*

¹² Exh. 8 at pg. 8.

¹³ *Id.*

¹⁴ CSSD's Supplemental Calculation dated March 3, 2010, numbered by OAH as Exhs. 18-20.

¹⁵ *Id.*

¹⁶ *Id.*

Mr. V. lives off base with his wife, M. and their two children, who are two and four years of age. M. is currently unemployed but Mr. V. testified his wife will likely return to work when their youngest child goes to school in about two to three years.

Mr. V. reported regular expenses of approximately \$4,036 per month, which includes \$1,425.62 for rent; \$580 for food, including eating out; \$171.31 for natural gas; \$70 for trash pickup; \$145 for internet, telephone, cable and telephone services; \$112.15 for electricity; \$100 for a cell phone; \$252.11 for the payment on a Ford Focus; \$385.61 for the payment on a Nissan Pathfinder; \$60 for vehicle maintenance; \$280 for gasoline for both vehicles; \$135.04 for vehicle insurance; \$30 for entertainment; \$155 for personal care items, including diapers; \$80 for tobacco and \$55 for the payment on a credit card with a balance of \$1,543.82.¹⁷ Mr. V. pays child support of \$887.10 per month for a prior child, plus about \$17 per month on arrears.¹⁸

Ms. H. lives in subsidized housing with K. and two other children. The custodian works for No Name store earning \$7.30 per hour for 15-25 hours per week in the customer service department. Ms. H. has not previously utilized the obligor's Tri-Care insurance coverage for K., but she said she lives close to a military base, so she planned on completing the necessary paperwork and signing up for Tri-Care.

III. Discussion

Mr. V. is challenging the calculation of his child support amount, specifically, CSSD's inclusion of his BAH, a non-pay benefit, in his total income. In addition he is requesting a variance in the child support award due to financial hardship. He claims the amount calculated will cause manifest injustice to his subsequent children. The person who filed the appeal, in this case, Mr. V., has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect.¹⁹

A. Mr. V.'s Income

A parent is obligated both by statute and at common law to support his or her children.²⁰ By regulation, CSSD collects support from the date the custodial parent requested child support

¹⁷ Exh. 11 at pg. 1; testimony of Mr. V.

¹⁸ Exh. 7.

¹⁹ 15 AAC 05.030(h).

²⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

services, or the date public assistance or foster care was initiated on behalf of the child(ren).²¹ In this case, Ms. H.' child support agency filed a petition with CSSD requesting child support services in January 2009, so that is the first month Mr. V. is obligated to pay support in this administrative child support action.²²

Civil Rule 90.3 specifically provides that a military parent's total income from all sources includes "Armed Service Members base pay plus the Obligor's allowances for quarters, rations, COLA and specialty pay."²³ The base pay figure is put into the calculation in the taxable income column.²⁴ The other benefits go into the nontaxable income column.²⁵ If the soldier lives off base, the BAH benefit used is the actual monetary amount included in the soldier's pay and reflected in the Leave and Earnings Statement (LES). If the soldier lives rent-free in base housing, CSSD treats the housing as an in-kind contribution, and its value, for child support purposes, is considered to be the same amount the soldier would receive for BAH while living off base.²⁶ The reason for including the non-pay benefits, especially the BAH, in the child support calculation is because they reduce the parent's living expenses and allow a military member to use the remainder of his or her cash pay to cover other expenses.

CSSD determined Mr. V.'s 2009 income consists of base pay and other entitlements totaling \$71,137.03.²⁷ This income figure yields a child support amount of \$899 per month for 2009 and the first two months of 2010.²⁸ Effective March 2010, Mr. V. was assigned to a new duty station in the Lower 48 states. As a result, his income for 2010 will be lower than in 2009 because he will no longer receive a COLA payment and his BAH will be lower. His total income for the year is estimated at \$60,249.84, which yields a child support amount of \$707 per month.²⁹ These two child support amounts are correct because they were based on Mr. V.'s

²¹ 15 AAC 125.105(a)(1)-(2).

²² See Exh. 1. CSSD initially established Mr. V.'s arrears as of November 2007, but CSSD subsequently reported that Ms. H.'s agency is requesting support only as of the date of their request forward. See CSSD's February 11, 2010, Supplemental Post-Hearing Brief.

²³ Civil Rule 90.3, Commentary III.A.29.

²⁴ See Exh. 10 at pg. 2.

²⁵ *Id.*

²⁶ See Civil Rule 90.3, Commentary III.A.19.

²⁷ Exh. 8 at pg. 8.

²⁸ *Id.*

²⁹ *Id.*

actual income figures and calculated pursuant to Civil Rule 90.3, Alaska's rule regarding child support calculations.

B. Financial Hardship

The second issue in this appeal is whether Mr. V. is entitled to a reduction in his child support obligation based on a financial hardship, pursuant to Civil Rule 90.3(c). Mr. V.'s child support is now correctly calculated at \$899 and \$707 per month for 2009 and as of March 2010, based on his total actual income.³⁰ It is from these calculations that Mr. V.'s request for a variance based on financial hardship should be considered.

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied." Civil Rule 90.3(c). The presence of "unusual circumstances" in a particular case may be sufficient to establish "good cause" for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children^[31]

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child, to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).³²

As can be seen in his December 2009 LES, Mr. V. received mid-month pay in the amount of \$1,177.31 and end-of-month pay of \$1,276.46, both of which total \$2,453.77.³³ Yet Mr. V. listed regular monthly expenses totaling \$4,036.84.³⁴ This figure is significantly higher than his monthly cash income, leading one to think it would be impossible for Mr. V. to meet all of his monthly financial obligations, especially since he has to pay child support for a prior child.

³⁰ Mr. V.'s support amount for 2009 should be used for the first two months of 2010 because, were it not for his move out of state, his child support for 2010 would most likely be the 2009 figure.

³¹ Civil Rule 90.3(c)(1).

³² See Civil Rule 90.3, Commentary VI.E.1.

³³ Exh. 13 at pg. 2.

³⁴ Exh. 11.

However, further examination of the December LES indicates that Mr. V. pays his rent and both car payments totaling \$2,063.34 via allotments from his paycheck before the deductions are calculated.³⁵ In addition, Mr. V.'s support obligation for his prior child is also figured into the deductions reflected on his paystub and does not have to be paid out of his available cash.³⁶ As a result, Mr. V. only has to pay bills totaling \$1,973.50 from his take-home pay of \$2,453.77,³⁷ which results in excess available cash of \$480.27 per month.³⁸ Also, now that Mr. V. has moved out of state, his housing expenses should go down to reflect the lower cost of living in the Lower 48 states.

Mr. V. still will be somewhat short of being able to pay the ongoing child support amount of \$707 per month plus a portion of his arrears, but with some judicious budgeting, he and M. should be able to manage. Of special significance here is that Ms. H.' child support agency is no longer collecting support prior to January 2009, so Mr. V.'s arrears have been cut almost exactly in half.³⁹ This should reduce his monthly arrears payment also. M. may have to return to work before the time that they had planned, but based on the evidence in its entirety, Mr. V.'s situation does not present "unusual circumstances" of the type contemplated by Civil Rule 90.3. He did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not reduced.

IV. Conclusion

Mr. V. met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order was incorrect, as required by 15 AAC 05.030(h), because he established that his 2010 and ongoing child support should be recalculated. That amount has been set at \$707 per month as of March 2010. Mr. V. did not prove by clear and convincing evidence that manifest injustice would result in the absence of a variation of the child support amount. CSSD's child support calculation of \$899 per month for 2009 is also correct and should be adopted.

³⁵ Exh. 13 at pg. 2.

³⁶ *Id.*

³⁷ $\$4,036.84 - \$2,063.34 = \$1,973.50.$

³⁸ $\$2,453.77 - \$1,973.50 = \$480.27.$

³⁹ *See* Exh. 8 at pg. 10.

V. Child Support Order

- Mr. V. is liable for child support for K. in the amount of \$899 per month for the period from January 2009 through February 2010; and \$707 per month, effective March 2010 and ongoing;
- All other provisions of CSSD's November 17, 2009, Amended Administrative Child and Medical Support Order remain in full force and effect.

DATED this 24th day of March, 2010.

By: Signed
Kay L. Howard
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Under AS 25.27.062 and AS 25.27.250, the obligor's income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of April, 2010.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]