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

IN THE MATTER OF:	)	
	)	OAH No. 10-0219-CSS
T. S. M.	)	CSSD No. 001158855
	)	

DECISION AND ORDER

I. Introduction

The obligor, T. S. M., appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on April 19, 2010. The Obligee child is L., who is seven years old.

The formal hearing was held on May 17, 2010. Mr. M. participated in person; the custodian, E. G., participated by phone, and Erinn Brian, Child Support Specialist, represented CSSD.

This is an establishment case based on an application for medical assistance for L. Mr. M.'s child support is set at $185 per month effective September 2009 through December 2009 and $227 per month, effective January 1, 2010, and ongoing based on the primary custody formula. His request for a variance based on financial hardship is denied.

II. Facts

A. History

Ms. G. applied for child support services in September 2009.[1] On January 25, 2010 CSSD served an Administrative Child and Medical Support Order on Mr. M.[2] He requested an administrative review claiming no duty of support is owed because L. is an Alaska Native.[3]

Following the administrative review, CSSD issued an Amended Administrative Child Support and Medical Support Order on April 19, 2010, that set Mr. M.'s ongoing support at $227 per month, effective May 1, 2010, with arrears of $1,648 for the period from September 2009 through April 2010.[4] Because Mr. M. provided no income information, CSSD based its 2009 gross income calculation on the unemployment benefits actually received for the first 13 weeks

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1 Exh. 3.
2 Exh. 4 at 3.
3 Exh. 5.

of 2009 and minimum wage ($7.15) at 30 hours per week for the remaining 39 weeks of 2009.[5] CSSD explained that the 30 hours was based on what Mr. M. had reported to his food stamps case worker. This resulted in a total 2009 gross income for purposes of child support in the amount of $12,307.[6] For 2010, CSSD calculated Mr. M.'s gross income by combining actual unemployment benefits received for the first 13 weeks and imputing income at the minimum wage ($7.75) at 40 hours per week. This resulted in a total 2010 gross income in the amount of $15,200.

Mr. M. timely appealed and requested a hearing. The basis for his appeal was his dissatisfaction with the process and that CSSD overstating his income because he is unemployed and has no income.[7]

B. Material Facts

Mr. M.'s work history is scant. As reported by the Alaska Department of Labor, his last period of employment was from the second quarter 2006 through the first quarter 2007 at CDS, Inc. His reported earnings for this period totaled $15,485.33.[8] Beginning in 2007, Mr. M. regularly received unemployment during the winter months but not during the summer. Mr. M. reviewed CSSD's Affidavit of Department of Labor and agreed that the information shown was correct.

When asked about his work history Mr. M. testified that before going to jail he built signs. He was released from jail in January 2007 and entered a program for disabled and homeless veterans. He explained that he was not disabled but he qualified because of his veteran status. As part of the program he spent three months in a domiciliary and then moved to transitional housing where he remained until December 2008. The first few months in the program he would earn $2.15 per hour.[9] When he moved to transitional housing Mr. M. worked in Veteran's industries earning $7.15 per hour.[10] Contrary to what his food stamp case worker reported, Mr. M. testified that he worked significantly less than 30 hours per week. Starting in

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4 Exh. 11.
5 Exh. 11 at 4.
6 The PFD was not included because Mr. M. was not eligible for the 2009 PFD.
7 Exh. 13.
8 Exh. 14.
9 M. Testimony.
10 M. Testimony.

January 2009, Mr. M. moved out of transitional housing and into an apartment. Because of the assistance he receives, he pays $50 per month out of pocket for his rent. When asked where the money came from to pay his rent, Mr. M. replied that he paid his rent for a year in advance out of the money he saved while working in the transitional program. He has no utility bills because utilities are included in his rent. He relies on food stamps for food and any incidentals are paid out of his savings and unemployment.

When asked about his efforts at obtaining employment, Mr. M. blamed CSSD and this child support proceeding for his inability to obtain employment. He stated that employers were not interested in hiring him once the prospective employer would learn about the child support order. As an example, Mr. M. testified that he had a job doing yard work but he had to quit because of the child support proceeding. When asked about his future plans, he testified it was "just a matter of time" until he returned to the sign shop and that it was "just a matter of time" until went to work at a construction company. He anticipates he would earn $10 per hour but that his work would be seasonal.

Mr. M. testified that he had L. almost every weekend and some week days. He would like to complete his GED but cannot afford the final class.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.[11] This obligation begins when the child is born.[12] However, by regulation, CSSD only collects support from the date the custodial parent requested child support services, or the date public assistance or services were initiated on behalf of the child(ren), for no more than six years prior to service on the obligor of notice of his or her support obligation.[13] Ms. G. applied for child support services in September 2009, so that is the first month for which Mr. M. is liable for paying child support through CSSD. Until CSSD receives a written request from Ms. G. to withdraw from services, it will continue to collect child support from Mr. M..

The person who filed the appeal, in this case, Mr. M., has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect.[14]

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

12 *CSSD v. Kovac*, 984 P.2d 1109 (Alaska 1999).

13 15 AAC 125.105(a)(1)-(2).

14 15 AAC 05.030(h).

A. Voluntary unemployment

Civil Rule 90.3(a)(1) provides that a noncustodial parent's child support obligation is to be calculated from his or her "total income from all sources." The obligor has the burden of proving his or her earning capacity.[15]

Because CSSD imputed income to Mr. M., implicit in its April 2010 order is a finding Mr. M. was voluntarily unemployed. If CSSD finds a parent to be voluntarily and unreasonably unemployed or underemployed, it may calculate the child support amount from the parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."[16]

On the basis of its finding that Mr. M. is voluntarily and unreasonably unemployed, CSSD calculated his income for child support purposes for 2009 at $12,307, which the calculation worksheet indicates was based on 13 weeks of unemployment plus 39 weeks at 30 hours per week at $7.17 per hour.[17] CSSD similarly calculated Mr. M.'s income for child support purposes for 2010 based on 13 weeks of unemployment plus 39 weeks at 40 hours per week at $7.75 per hour.

In cases in which CSSD is claiming voluntary unemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."[18] If the parent is voluntarily unemployed or underemployed, it is also necessary to determine whether the parent's unemployment is unreasonable. An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."[19] It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.[20]

If a parent is found to be voluntarily unemployed or underemployed, potential income will be based on that parent's "past income, skills, work history, and education and the job

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15 *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

16 Civil Rule 90.3(a)(4).

17 Exh. 11.

18 *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

19 *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

20 *Kowalski*, 806 P.2d at 1371.

opportunities in the area where the parent physically resides."[21] The use of "potential income" in a child support obligation is not to punish the obligor parent; rather, it is to insure that the child(ren) and the other parent are not "forced to finance" the obligor parent's lifestyle.[22] The commentary states the court should consider "the totality of the circumstances" when deciding whether to impute income to the obligor parent.[23] A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

> An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.[24]

Based on the evidence, it is more likely than not that Mr. M. is voluntarily and unreasonably unemployed. He admitted that he was not disabled and that he could work. His attempt to blame CSSD for his unemployment is not supported by the record. Mr. M. was unemployed for the year prior to Ms. G. requesting services from CSSD. His unemployment existed prior to CSSD issuing its order. Mr. M.'s ability to support himself with no sources of income other than what he testified he saved while purportedly working significantly less than 30 hours per week at minimum wage for six months a year and a half earlier is incredible. Additionally, an employer could be fined up to $1,000 if the employer refuses to hire an obligee or fires an employee because of a child support wage-withholding order or a Medical Support Notice.[25] Mr. M. testified that he is waiting for work to start up yet he could not explain why he has not worked since January 2009. His testimony was often contradictory. For example, he testified that he was doing yards for a company but he had to quit because his boss did not like dealing with child support.[26] When he was reminded that it was illegal to be terminated because of child support garnishment, Mr. M. changed his story to he was not hired because the boss did not want to deal with child support. He was evasive and less than forthcoming with information.

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21 15 AAC 125.020(b).
22 *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).
23 Civil Rule 90.3, Commentary III.C.
24 *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).
25 AS 27.25.062(f).

Based on the evidence as a whole, Mr. M. has not proven by a preponderance of the evidence that he is not voluntarily and unreasonably unemployed. Put another way, CSSD's imputation of income to Mr. M. was correct. Mr. M. has failed to establish that his unemployment is due to anything other than a personal choice. He attempts to blame CSSD but that is not compelling. Rather, it appears Mr. M.'s financial situation is one of personal choice.

He has not proven that he is not voluntarily and unreasonably unemployed, so Mr. M.'s child support should be calculated based on his "work history, qualifications and job opportunities."[27] Imputing income to Mr. M. at the minimum wage is reasonable in light of his work history, education and skill level. The last year of reported income for Mr. M. revealed that he earned $15,485.51 from the second quarter 2006 through the first quarter 2007. CSSD has proposed a calculation based on a combination of unemployment, PFD and minimum wage resulting in an annual gross income in 2010 of $15,200. CSSD's imputed income is close to what he earned when he was last employed. Therefore, CSSD's imputed annual gross income of $15,200 is in keeping with his work history, qualifications, and job opportunities.

B. Shared Custody

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in a situation in which one parent has primary custody. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support will have a somewhat lower monthly support amount than in a primary custody scenario. The rule defines shared custody as follows:

> A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody.[28]

In order for a visitation day to count toward the required 30% of the year, the child(ren) must stay overnight with the respective parent.[29] One year is equal to 365 days, so 30% of the

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26 M. Testimony.

27 Civil Rule 90.3(a)(4).

28 Civil Rule 90.3(f)(1).

29 Civil Rule 90.3, Commentary V.A.

overnights in one year equal 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.[30]

If there is no court order regarding custody, a finding of shared custody under Civil Rule 90.3(f)(1) should be based on a written agreement, but the parties to child support actions rarely have one. Thus, the administrative law judge must make findings of fact regarding whether shared custody exists and, if so, what percentage of shared custody each party exercises. Mr. M. testified that he had L. most weekends and at other times. He presented no other evidence in support of his claim for shared custody. His statement alone is insufficient to establish that he had custody in excess of 30% of the time.[31] However, should Mr. M. and Ms. G. enter into a shared custody arrangement, Mr. M. should petition for modification based on now having shared custody.

C. Financial hardship

Mr. M. testified that he cannot afford to pay child support and requested a variance pursuant to Civil Rule 90.3(c). 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."[32] 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 . . . .[33]

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30 In general, a party having visitation with a child for 8 or 9 overnights per month (96 – 108 overnights total), on average, will attain the 110 overnight minimum with the addition of a few extra nights during the year, such as during the holidays or other vacation periods.

31 Shared custody child support is calculated by determining each parent's primary custody child support obligation to the other parent, as if each parent had primary custody of the child(ren). The figures are then inserted into a mathematical formula that calculates the paying parent's child support from a combination of both parents' primary custody support obligations and their individual shared custody percentages. *See generally* Civil Rule 90.3(b).

32 Civil Rule 90.3(c).

33 Civil Rule 90.3(c)(1).

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).[34]

Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. M. 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 varied. Mr. M. is voluntarily and unreasonably unemployed and his financial circumstances will improve when he begins working again. The obligor may lack the ability to pay the total child support amount every month while he is unemployed, and he will no doubt incur arrears while he is unemployed, but Mr. M. should be able to start paying those off once he starts working again. Pursuant to 15 AAC 125.545(c), when an obligor's annual income is greater than $10,320 but less than $15,449 and owes arrears of less than $5,000, the payment amount may be $20 per month.[35]

IV. Conclusion

Mr. M. did not meet his burden of proving that the Amended Administrative Child Support and Medical Support Order was incorrect. He is voluntarily and unreasonably unemployed. Therefore, CSSD's April 19, 2010, Amended Administrative Child Support and Medical Support Order should be affirmed.

V. Child Support Order

- CSSD's April 19, 2010, Amended Administrative Child Support and Medical Support Order is affirmed.

DATED this 7th day of July, 2010.

By: *Signed*
Rebecca L. Pauli
Administrative Law Judge

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34 Civil Rule 90.3, Commentary VI.E.1.

35 At hearing Mr. M. was incorrectly informed that his payment would be $90 per month.

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 26th day of July, 2010.

By: *Signed*
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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