

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

In the Matter of:)
)
G L. E) OAH No. 10-0287/10-0303-CSS
) CSSD No. 001094862
_____)

DECISION AND ORDER

I. Introduction

The obligor, G E, and the custodial parent, J C, both appeal an Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD).¹ The obligee children in this matter are S C. C and G G. C.

As discussed below, Mr. E' support obligation cannot be modified for months prior to February of 2009. His support obligation should be set at \$637 per month from February 1, 2009 through December 31, 2009, and his ongoing support should be set at \$502 per month beginning January 1, 2010.

II. Facts

A. Background

This matter comes to the Office of Administrative Hearings with a long and complex procedural history. The most relevant occurrences are described here.

Ms. C first applied for services for one child in January of 1999.² A Notice of Finding of Financial Responsibility (Administrative Child Support and Medical Order) was issued on March 15, 1999.³ Mr. E appealed.⁴ CSSD issued an Administrative Review Decision on Notice and Finding of Financial Responsibility (Administrative Child Support Order) on December 10, 1999.⁵ Mr. E appealed that decision.⁶

¹ The agency was previously named Child Support Enforcement Division. CSSD is used to refer to both Child Support Enforcement Division and Child Support Services Division.

² Exhibit 1.

³ Exhibit 2.

⁴ Exhibit 3.

⁵ Exhibit 6.

⁶ Exhibit 7.

A formal hearing was held but Mr. E did not appear at the hearing. The Hearing Officer,⁷ acting as the Commissioner of Revenue's delegate, issued a decision on April 27, 2000.⁸ Pursuant to 15 AAC 05.030(j), this decision was issued without taking Mr. E' testimony.

CSSD received an application for services from Ms. C on October 23, 2000.⁹ The agency mailed a Notice of Petition for Modification of Administrative Support Order on November 29, 2000.¹⁰ A Request for Modification of Administrative Support Order was received from Mr. E on September 26, 2001.¹¹ Mr. E also submitted a letter stating that he was living in the same household as Ms. C, contesting the amount of arrears, and contesting the amount of ongoing child support. This letter concluded by asking for forms to apply for a modification.¹² Neither his Request for Modification nor his letter asked to vacate the prior child support order.

CSSD issued a Modified Administrative Child Support and Medical Support Order on January 8, 2002.¹³ This order never became effective because it was not personally served on Mr. E.¹⁴

Mr. E submitted a Motion to Vacate Default Child Support Order (addressed to the April 27, 2000 decision) at some time in 2008.¹⁵ This motion appears in the record at Exhibit 22. Page 1 of Exhibit 22 has a handwritten note at the top stating that it was filed in February of 2008. Mr. E' signature is dated December 30, 2008. Page 2 of this exhibit is dated by Mr. E on October 21, 2008, and stamped received by CSSD on October 21, 2008. Notice of the request to set aside the default order was mailed to Ms. C in January of 2009.¹⁶

Based on CSSD's Diary History report submitted by Mr. E, it does appear more likely true than not true that Mr. E attempted to start the process of filing his motion to vacate in

⁷ Prior to the creation of the Office of Administrative Hearings, formal child support hearings were conducted by Hearing Officers appointed by the Commissioner of Revenue.

⁸ Exhibit 9.

⁹ Exhibit 10. This application requests services for two children.

¹⁰ Exhibit 13.

¹¹ Exhibit 17.

¹² Exhibit 18.

¹³ Exhibit 19.

¹⁴ CSSD's Pre-Hearing Brief, page 2, fn 4.

¹⁵ Exhibit 22.

¹⁶ Exhibit 23.

February. It is not clear when his motion was complete, but it is clear that notice of his request was not sent to Ms. C until January of 2009.

A Request for Modification of Child Support Order was received from Ms. C on December 3, 2009.¹⁷ CSSD mailed a Notice of Petition for Modification of Administrative Support Order on December 4, 2009.¹⁸ CSSD purported to vacate its March 15, 1999, Notice and Finding of Financial Responsibility on May 6, 2010.¹⁹ A new Administrative Child Support and Medical Support Order was issued on May 6, 2010.²⁰ This order set ongoing child support and arrears back to 1998. Mr. E and Ms. C both appealed.²¹

On February 23, 2009, the United States District Court entered judgment against Mr. E on federal charges of failure to pay child support.²²

The hearing in this matter commenced on September 1, 2010. Evidence was presented, but the hearing was adjourned before Ms. C had an opportunity to cross-examine Mr. E, and before she had an opportunity to present evidence. A supplemental hearing took place on October 25, 2010. Prior to that date, an order was issued by the Administrative Law Judge holding that CSSD did not have the power to vacate the original administrative order in this case because that order had been superseded by the April 27, 2000 order issued by Hearing Officer Handley.²³

Additional testimony was taken at the October 25, 2010 supplemental hearing. In addition, CSSD requested permission to file a motion to reconsider the ALJ's October 11 order. That request was granted. CSSD submitted its motion, and Mr. E and Ms. C have submitted briefing in response to that motion.

B. Material Facts

In 2009, Mr. E' wages as reported by the Department of Labor were \$33,019.²⁴ CSSD calculated his child support obligation based on those wages to be \$472 per month for one child,

¹⁷ Exhibit 37.

¹⁸ Exhibit 38.

¹⁹ Exhibit 40.

²⁰ Exhibit 41.

²¹ Exhibits 44 and 45

²² Exhibit 43, page 8.

²³ Exhibit 9. *See* Order issued by ALJ dated October 11, 2010.

²⁴ Exhibit 48.

and \$637 per month for two children.²⁵ In September, Mr. E testified that his wages have decreased for 2010 because he was working only two weeks out of every six, and because the amount of overtime work had decreased. A comparison of his June 2010 payroll records²⁶ with his August 22, 2010 pay stub²⁷ shows that he did in fact receive less overtime in July and August than he received in the first six months of the year.²⁸

At the October 25 supplemental hearing, Mr. E testified that he was no longer employed. He learned this information after the September 1 hearing date. He is looking for work, but has not found other employment at this time.

III. Discussion

A. Introduction

A parent is obligated both by statute and at common law to support his or her children.²⁹ Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." Child support orders may be modified upon a showing of "good cause and material change in circumstances."³⁰ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes "material change in circumstances" has been established and the order may be modified. If the 15% change has not been met, CSSD may still modify the child support obligation, but is not required to do so. A modification is effective beginning the month after the parties are served with notice that a modification has been requested.³¹ Finally, the person appealing CSSD's decision has the burden of demonstrating that the decision is incorrect.³²

B. The Original Order.

The original Administrative Review Decision was issued pursuant to AS 25.27.160. CSSD does have the authority to vacate orders issued pursuant to that statute:

²⁵ Exhibit 41, page 18.

²⁶ Exhibit 45, page 54.

²⁷ Exhibit A.

²⁸ He earned an average of approximately \$4288 a month in overtime during the first six months, but only an average of about \$2,761 per month during the next two months.

²⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

³⁰ AS 25.27.190(e).

³¹ 15 AAC 125.321(d).

³² 15 AAC 05.030(h).

Upon the motion of an obligor, the agency may, at any time, vacate an administrative support order issued by the agency under AS 25.27.160 that was based on a default amount rather than on the obligor's actual ability to pay.^[33]

In this case, however, the order that set Mr. E' support obligation is not the administrative order issued by CSSD under AS 25.27.160. CSSD's order was replaced with an order issued by the Commissioner of Revenue, through his delegee, pursuant to AS 25.27.170.

CSSD relies on 15 AAC 125.121(a) as granting it authority to vacate the applicable child support order here.³⁴ This regulation does provide that the agency may vacate "an administrative support order." It is vague as to what range of orders is encompassed by that phrase. CSSD states that this regulation implements AS 25.27.195. While an implementing regulation might clarify vague language in a statute, a regulation could not be used to repeal or amend a statute. A regulation is only valid to the extent it is consistent with and reasonably necessary to carry out the purpose of the statute.³⁵

The plain language of AS 25.27.195, the statute implemented by this regulation, says that orders issued pursuant to AS 25.27.160 may be vacated. It does not say that any other orders may be vacated. To carry out the purposes of AS 25.27.195, it is only reasonably necessary to have a regulation allowing CSSD to vacate orders issued pursuant to AS 25.27.160. To allow the agency to vacate other orders would not be consistent with the limited authority granted by AS 25.27.195.³⁶

CSSD has cited cases in which the Alaska Supreme Court noted that AS 25.27.195 authorized the agency to vacate orders entered based on default income amounts.³⁷ In none of those cases, however, was it necessary for the court to address the question at issue here, which is what orders may be vacated. In each case, the court simply noted in passing that some

³³ AS 25.27.195(b) (emphasis added).

³⁴ October 6, 2010 brief from CSSD, at 2.

³⁵ *Rubey v. Alaska Commission on Postsecondary Education*, 217 P.3d 413, 417 n. 16 (Alaska 2009); *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971).

³⁶ When there are material changes in circumstances, the support obligation may be modified, but those modifications may not be retroactive. AS 25.27.190. When there are changed circumstances, the prior order is not vacated, but a new order establishing a new support obligation may be entered.

³⁷ *Lawson v. Lawson*, 108 P.3d 883, 888 n.35 (Alaska 2005); *Teseniar v. Spicer*, 74 P.3d 910, 915 (Alaska 2003); *Hendron v. State*, 957 P.2d 1350, 1352 (Alaska 1998).

authority to vacate prior orders did exist.³⁸ Therefore, 15 AAC 25.121 must be construed to apply only to the division's orders and not to the Commissioner's orders.

CSSD argues that this is a valid regulation, that it must be applied as written, and that it cannot be modified or ignored during the hearing process. CSSD is correct. However, this order is not ignoring or modifying 15 AAC 125.121. This order is construing potentially vague language in that regulation to be consistent with the statute that it was written to implement.

It is also important to note that orders issued by CSSD pursuant to AS 25.27.160 are still reviewable by the Department of Revenue.³⁹ Once that Department review occurs, however, an order is issued pursuant to AS 25.27.170. This is a final agency decision subject to review by the superior court.⁴⁰ With limited exceptions, once this order is issued by the Department of Revenue, the Department does not have jurisdiction to vacate that order.⁴¹

Prior OAH cases cited by CSSD and Mr. E do not require a different result. *In the Matter of D.R.C.*,⁴² cited by Mr. E, holds that CSSD has the authority to set aside administrative orders based on group wage statistics.⁴³ The procedural history discussed in that decision, however, does not show any order issued by the Commissioner of Revenue or his delegee. Instead, the default order being set aside was an order issued by CSSD.

Similarly, the cases cited by CSSD involved vacating default orders set by CSSD, and not orders entered by the Commissioner of Revenue, or his delegee.⁴⁴

The existing child support order may not be vacated. It can, however, be modified. As discussed in more detail below, Mr. E' motion to vacate the prior order should be treated as a motion for modification. Because Ms. C was notified of this motion in January of 2009, any modification would be effective February 1, 2009.

C. *Suspension of Ongoing Support.*

38

Id.

39

15 AAC 25.27.160(d).

40

AS 25.27.210.

41

AS 25.27.195.

42

OAH 06-0599 CSS.

43

CSSD's motion for reconsideration also included a discussion of group wage statistics. To the extent that the October 11 order included an alternative basis for ruling that the default order cannot be vacated, that discussion is reconsidered. CSSD is correct that the original administrative order, Exhibit 6 was properly characterized as a default order.

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In the Matter of R.P.J., OAH No. 10-0048-CSS; *In the Matter of J.L.P.*, OAH No. 09-0695-CSS.

Mr. E asserts that he was living with Ms. C from April 15, 1998 to July of 2001.⁴⁵ Ms. C denies this allegation. A valid support order issued pursuant to AS 25.27.160 will be suspended during periods of time when the obligor parent is living with the custodial parent.⁴⁶ As discussed above, however, the order in effect here was not issued pursuant to AS 25.27.160. Thus, this regulation does not apply. Instead, Civil Rule 90.3 applies.⁴⁷ This rule prohibits retroactive modification of child support arrears.⁴⁸ Even if Mr. E’ testimony that the parties were living together is accepted, the arrears may not be modified retroactively. There is, however, a provision that could preclude Ms. C from collecting a portion of those arrears.

The court may find that a parent and a parent’s assignee are precluded from collecting arrearages for support of a child that accumulated during a time period exceeding nine months for which the parent agreed or acquiesced to the obligor exercising primary custody of the child. A finding that preclusion is a defense must be based on clear and convincing evidence.^[49]

Again assuming that Mr. E was in fact living with Ms. C, he did not have “primary custody” of the children as defined by Civil Rule 90.3. For Mr. E to have primary custody, the children would have had to be out of Ms. C’s household for 30 percent of the year, or more.⁵⁰ At best, the parties were in the same household during this time which necessarily means that Mr. E did not have primary custody.

D. Credit for Supporting Child of Prior Relationship

Mr. E has asserted two issues on appeal related to his son J E who was born in 1991. He seeks credit for child support actually paid for J as well as credit for supporting J after Mr. E received full custody of him.⁵¹ The child support payments for J made by Mr. E all occurred before February 1, 2009.⁵² As discussed above, no modification can be made as to the arrears that may have accrued prior to that date.

In addition, the “credit” that Mr. E is seeking is a credit that would be included in the calculation to determine the amount of the child support obligation. In order to receive this

⁴⁵ Exhibit 45, page 2.

⁴⁶ 15 AAC 125.870(a)(1).

⁴⁷ 15 AAC 125.010.

⁴⁸ Civil Rule 90.3(h)(2); Civil Rule 90.3, Commentary X.B.

⁴⁹ Civil Rule 90.3(h)(3).

⁵⁰ Civil Rule 90.3(f)((2).

⁵¹ Exhibit 45, page 2.

⁵² Exhibit B.

credit, Mr. E needed to request a modification of the existing child support order and ask that the modified order take into account the support he was actually providing for J.

The issue is different as to Mr. E' support of J after February 1, 2009. As of that date, both arrears and ongoing support may be modified in appropriate situations. Mr. E testified that J is still a dependent and is attending a vocational training school. J's birth date is 00/00/91. Accordingly, he turned 19 on 00/00/10. Mr. E could be entitled to credit for supporting his 18 year old son from February 1, 2009 through 00/00/10.⁵³ He would only be entitled to this credit if J were pursuing a high school diploma or the equivalent level of vocational training. If J is seeking vocational training after receiving his high school diploma or GED, then Mr. E would not be entitled to this credit. Mr. E has the burden of proof on this issue.⁵⁴ He has not met his burden of proving that J is seeking the equivalent of a high school education while enrolled in his AVTEC vocational training program.

E. Credit for Payments Made in Support of S and G

Mr. E asserts that he did not receive credit for some of the payments he has made. Because it has been determined that this is a modification proceeding, there is no jurisdiction to review CSSD's accounting. Mr. E can request an administrative review of his payment history. At the conclusion of that review, he will have the right to appeal CSSD's decision if he disagrees with it.

F. Self-Employment Income

Mr. E disagrees with CSSD's calculations of his income during the years he was self-employed. He has submitted tax returns from 1998 through 2008, which were all completed in 2008. CSSD accepted his reported gross receipts as accurate, but disallowed some of his business deductions. It is not necessary to determine Mr. E' income during these years, because his support obligation may not be modified for that time period. It is also not necessary to consider his 2009 tax return because Mr. E' income for 2009 is derived from wages reported to the Department of Labor.⁵⁵

G. Federal Poverty Level

⁵³ AS 25.24.140(a); AS 25.07.061.

⁵⁴ 15 AAC 05.030(h).

⁵⁵ Exhibit 48.

Mr. E argues that for several years his income fell below the federal poverty level, so his support obligation should have been set at the minimum obligation of \$50 per month. The provision in Civil Rule 90.3 related to the federal poverty level was deleted effective April 15, 2005 by Supreme Court Order No. 1526. While the federal poverty level may still be a factor to consider under Civil Rule 90.3(c)(1), it is not longer an automatic reason for decreasing a parent's support obligation. In this case, it is not necessary to consider the federal poverty level because Mr. E has been earning wages that place him above that level for the time period subject to modification.

H. Deduction for New Jersey Taxes

This issue relates to the years 1999 – 2001. Because those years are not subject to modification, there is no reason to determine whether CSSD's calculations were correct.

I. Federal Taxes for 2009

Mr. E asserts that CSSD's calculations do not include the correct amount of social security, Medicare, and federal tax withholding for 1998 through 2009. Only 2009 is subject to modification. His employer reported to the Department of Labor that Mr. E earned a total of \$33,019 in wages that year.⁵⁶ Mr. E's 2009 tax return shows total federal taxes paid for the whole year (including withholding) of \$803.⁵⁷ CSSD gave him credit for \$501.51 in taxes *each month* for that year.⁵⁸ Mr. E has not met his burden of proving that CSSD's calculation is incorrect.

J. Medical and Dental Insurance

There was evidence admitted at the hearing that Mr. E attempted to provide medical insurance for his daughters. There was additional evidence, however, that this coverage never became effective because his daughters were not eligible for coverage under the terms of his plan.⁵⁹ While Mr. E is commended for attempting to provide this coverage, he is not entitled for credit because he was not able to provide insurance coverage for his daughters.

K. Projection of Annual Gross Income

Mr. E's most recent paystub, Exhibit A, is the best available evidence of what Mr. E has earned through August 22, 2010. Since then, he has received unemployment benefits of \$370 per

⁵⁶ Exhibit 48.

⁵⁷ Exhibit 39, page 4.

⁵⁸ Exhibit 41, page 18.

⁵⁹ Ms. C's Exhibit 11, page 12. Mr. E was attempting to provide insurance through his wife's insurance plan, and that plan would only cover step-children if they were living in the home.

week. Presumably, these began after the five week waiting period. Accordingly, the best estimate of Mr. E' 2010 income is \$19,488 in regular wages, plus 14 weeks of unemployment benefits amounting to \$5,180.

Normally, overtime is included as income when calculating child support. There is discretion to exclude this income when it is earned for the purpose of paying off child support arrears.⁶⁰ Mr. E worked on the North Slope in extreme weather conditions. He testified that his doctor has advised him against working in these conditions, but he continued to do so because this was the best paying job he had been able to obtain. He also testified that he volunteered for overtime work in order to pay his child support arrears. Those arrears are very large, and he is unlikely to be able to pay this debt if his ongoing child support includes his overtime pay. This is an appropriate case for excluding overtime pay from the child support calculation.

When Mr. E' wages and unemployment benefits are inserted into CSSD's online child support calculator, his support obligation is calculated at \$502 per month for two children, and \$371 per month for one child.⁶¹

This is the amount of support he should be obligated to pay for 2010. It is also the amount he should be obligated to pay in the future. While unemployment is considered temporary, it may take some time for Mr. E to find another job because of his prior criminal convictions. He can be expected, however, to find employment at some time, and given his job skills, he will likely earn more than minimum wage.⁶²

At this time, the best information available about what Mr. E will earn in the future is his income from 2010 plus his expected unemployment benefits. When he does obtain employment, or when his unemployment benefits run out, either Mr. E or Ms. C may seek to modify this order.⁶³

L. Ms. C's Appeal

Ms. C's primary contention on appeal is that Mr. E is attempting to avoid paying the amount of restitution ordered in his criminal case.⁶⁴ It is questionable whether any change in Mr.

⁶⁰ Civil Rule 90.3, Commentary VI.B.5.

⁶¹ Attachment A.

⁶² Because of his obligation to provide support, however, he should be careful about refusing any offer of employment, even if it is at minimum wage. See 15 AAC 125.060 (voluntary unemployment or underemployment).

⁶³ Modifications are not retroactive, so a prompt request upon changed circumstances is recommended.

⁶⁴ Exhibit 44.

E' child support obligation would allow him to set aside the restitution ordered by the Federal court more than a year ago, but that issue does not need to be resolved here. Mr. E has the right to seek modification regardless of his motivation for doing so. It will be up to the Federal Court to decide what effect, if any, this modification has on his restitution order.

Ms. C also asserts that Mr. E has unreported income and is voluntarily unemployed. Since February 1, 2009, however, Mr. E has not been voluntarily unemployed or underemployed. Ms. C has not shown that he has unreasonably failed to take a second job. Nor has she shown that he earned income that is not being reported.

Finally, Ms. C asserts that because of his federal conviction, Mr. E may not deny that he had the ability to pay child support but willfully failed to pay it. Because this proceeding has been limited to modifying the support obligation only as of February 1, 2009, and because Mr. E' federal conviction relates to time periods prior to that date, Mr. E' conviction would not prevent him from contesting the amount of the child support obligation in this proceeding.

IV. Conclusion

For the reasons discussed above, the Corrected Child Support Decision of April 27, 2000 (Exhibit 9) remained in effect through January of 2009. Mr. E' child support obligation should be set at \$637 per month for two children beginning on February 1, 2009,⁶⁵ and at \$502 per month for two children and \$371 per month for one child beginning on January 1, 2010.

V. Child Support Order

- Mr. E' child support obligation through the end of January 2009 remained at \$482 per month for one child;
- Mr. E' child support obligation for February 1, 2009 through December 31, 2009, is set at \$637 per month for two children;
- Mr. E' ongoing support obligation is set at \$502 per month for two children and \$371 per month for one child effective January 1, 2010;
- All other provisions of the May 6, 2010, Administrative Child Support and Medical Support Order issued by CSSD remain in full force and effect.

DATED this 19th day of November 2010.

⁶⁵ Exhibit 41, page 18.

By: Signed
Jeffrey A. Friedman
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 28th day of December, 2010.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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