

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

In The Matter of:	)	
	)	OAH No. 10-0374-CSS
T. B. F.	)	CSSD No. 001063194
_____	)	

**DECISION AND ORDER**

**I. Introduction**

The custodian, E. O. Z. (now known as “M.”), appeals a Notice of Denial of Modification Review that the Child Support Services Division (CSSD) issued in Mr. F.’s case on June 16, 2010. The obligee child is I., 14 years old.

The formal hearing was held on August 16, 2010. Mr. F. participated by telephone; Ms. M. appeared in person. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded; the record closed on August 16, 2010.

Based on the record and after due deliberation, CSSD’s Notice of Denial of Modification Review is affirmed. Mr. F. is currently unemployed but there is no evidence in the record to suggest that this unemployment will be anything other than temporary. On that basis, there is insufficient evidence to establish that Mr. F. has had a material change in circumstances such that his child support should be modified. Mr. F.’s child support shall remain at \$425 per month, as set in 2006.

**II. Facts**

*A. Background*

Mr. F.’s child support obligation for I. was set at \$425 per month in November 2006.<sup>1</sup> On March 30, 2010, Mr. F. requested a modification review.<sup>2</sup> On April 6, 2010, CSSD issued a Notice of Petition for Modification of Administrative Support Order.<sup>3</sup> After Mr. F. provided income information, CSSD conducted a modification review.<sup>4</sup> On June 16, 2010, issued a Notice of Denial of Modification Review that denied Mr. F.’s petition for modification for the reason that his total income in 2009 did not yield a child support amount that was at least 15%

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<sup>1</sup> Exh. 1.  
<sup>2</sup> Exh. 2.  
<sup>3</sup> Exh. 3.  
<sup>4</sup> Exh. 4.

higher than the previous amount.<sup>5</sup> Ms. M. filed an appeal on July 6, 2010, in order to verify that all of Mr. F.'s income had been properly disclosed and considered.<sup>6</sup>

*B. Material Facts*

At the hearing, Mr. F. gave testimony regarding his current circumstances. He is an e. t. and at least since 2006, has worked for the Alaska Native Tribal Health Consortium, the Native hospital in Anchorage. In March 2010, Mr. F. quit his job at the Native hospital in order to enroll in the University of Alaska at Anchorage (UAA) and pursue a nursing degree. Unfortunately he was not able to go to UAA because the funding for school that he thought he could obtain from the B. B.N. C. and the C. Corporation did not materialize as he had planned. When asked to explain this situation further, Mr. F. admitted that he quit his job before he had secured the funding necessary for school. The obligor said his wife is in the same predicament – she is a certified nurse assistant who typically works in the operating room and she had also quit her job in anticipation of obtaining a nursing degree at UAA, but her funding fell through also.

Information reported to the Alaska Department of Labor and Workforce Development by Mr. F.'s employers indicates that his annual salary was over \$41,231.46 in 2008 and \$41,643.65 in 2009.<sup>7</sup> He earned \$8,728.84 in the first quarter of 2010, then began receiving unemployment benefits on May 1, 2010.<sup>8</sup> He was still unemployed at the time of the hearing.

**III. Discussion**

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."<sup>9</sup> 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 modify the child support obligation, but is not

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<sup>5</sup> Exh. 5.

<sup>6</sup> Exh. 6.

<sup>7</sup> Exh. 7 at pg. 1.

<sup>8</sup> Exh. 7 at pgs. 1-2.

<sup>9</sup> AS 25.27.190(e).

required to do so. CSSD may also decline the review if the person who requests it does not provide sufficient evidence to review the underlying child support order.<sup>10</sup>

A modification is effective beginning the month after the parties are served with notice that a modification has been requested.<sup>11</sup> The person requesting the hearing, in this case, Ms. M., has the burden of proving that CSSD's Notice of Denial of Modification Review was issued in error.<sup>12</sup>

Mr. F.'s child support was set at \$425 per month for I. in 2006. After he filed his petition for modification, CSSD calculated a child support amount of \$479 per month, based on the wages reported on his 2009 W-2 form and the PFD.<sup>13</sup> CSSD then determined that \$479 was only 13% more than the previous amount of \$425, and for that reason denied the petition for modification review.<sup>14</sup> CSSD now asserts that Mr. F. is voluntarily unemployed and submitted a revised calculation of \$593 per month, based on the Medicare wages reported on his 2009 W-2, the PFD and Native corporation dividends totaling \$945.<sup>15</sup>

An obligor parent has the burden of proving his or her earning capacity.<sup>16</sup> If a parent is found to be voluntarily and unreasonably unemployed, his or her child support amount may be calculated from that parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."<sup>17</sup> The essence of an inquiry into whether an obligor is voluntarily unemployed or underemployed is to determine if he or she has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."<sup>18</sup>

Mr. F. was unemployed at the time of the hearing because he made the unfortunate decision to quit his well-paying job to go to college before he had the funding in place to finance his education. Now he has to find another job, which he testified he is doing. Although it is clear that Mr. F. is unemployed due to his own choices, the evidence does not support a finding

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<sup>10</sup> *Id.*

<sup>11</sup> 15 AAC 125.321(d). In this case, the effective date of the modification would be May 1, 2010 because CSSD issued the notice on April 7, 2010. Exh. 3.

<sup>12</sup> 15 AAC 05.030(h).

<sup>13</sup> Exh. 4 at pg. 3; Exh. 5 at pg. 2.

<sup>14</sup> Exh. 5 at pg. 1.

<sup>15</sup> Exh. 7 at pg. 3. CSSD did not identify the evidentiary source of the figure it used for Mr. F.'s Native dividends, but it appears that number comes from his tax return, as shown at Exh. 4 at pg. 12.

<sup>16</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>17</sup> Civil Rule 90.3(a)(4).

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

that he quit his job for the “purpose of becoming or remaining unemployed.”<sup>19</sup> He quit his job to go to college, a plan that ultimately fell through for both him and his wife. There is insufficient evidence to prove that Mr. F.’s unemployment is anything other than a temporary circumstance that will improve when he finds another job. Alaska law generally considers unemployment to be a temporary circumstance that should not result in the reduction of an obligor parent’s child support obligation.<sup>20</sup> It is not necessary to recalculate his child support based on a “potential income” figure when Mr. F. already has a child support amount in place. The obligor may lack the ability to pay the total child support amount every month while he is unemployed, and he may incur some additional arrears while he is unemployed, but Mr. F. should be able to start paying those off once he starts working again.

#### **IV. Conclusion**

Mr. F. is unemployed at this time, but it is a temporary circumstance that does not justify modifying his child support obligation. Mr. F.’s order to pay \$425 per month should not be modified. CSSD correctly denied his petition for modification review.

#### **V. Child Support Order**

- CSSD’s June 16, 2010, Notice of Denial of Modification Review is affirmed;
- Mr. F.’s child support for I. remains at \$425 per month;
- All other provisions of the prior order in Mr. F.’s case, the Modified Administrative Child Support and Medical Support Order dated August 1, 2006, as adjusted by the Decision and Order in OAH Case No. 06-0663-CSS, issued on November 8, 2006, remain in full force and effect.

DATED this 23<sup>rd</sup> day of September, 2010.

By: Signed \_\_\_\_\_  
Kay L. Howard  
Administrative Law Judge

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<sup>19</sup> Emphasis added.

<sup>20</sup> *Patch v. Patch*, 760 P.2d 526 (Alaska 1988). See also *In The Matter Of M.J.V.*, OAH Case No. 09-0181-CSS.

### 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 20<sup>th</sup> day of October, 2010.

By: Signed  
Signature  
Jerry Burnett  
Name  
Deputy Commissioner  
Title

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