

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

IN THE MATTER OF:)

G T. E)

) OAH No. 11-0009-CSS

) CSSD No. 001036855

DECISION AND ORDER

I. Introduction

The obligor, G T. E, appealed a Notice of Denial of Modification Review that the Child Support Services Division (CSSD) issued in his case on December 2, 2010. The obligee children are V, 17, and C, 16. The other party is J E. E.

The hearing was held on February 17, 2011 and May 2, 2011. Mr. E appeared both times in person and Ms. E participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after due deliberation, CSSD's Notice of Denial of Modification Review is vacated and Mr. E's child support obligation is modified to \$1,004 per month for two children (\$743 per month for one child), effective October 1, 2010; and further modified to \$1,294 per month for two children (\$959 per month for one child), effective January 1, 2011 and ongoing.

II. Facts

A. Background

Mr. E's child support obligation was set at \$1,728 per month for three children in August.¹ Mr. E requested a modification review on September 27, 2010.² On September 28, 2010, CSSD notified the parties that a modification review had been requested.³ Mr. E provided income information.⁴ On December 2, 2010, CSSD issued a Notice of Denial of Modification Review for the reason that a monthly child support calculation from Mr. E's estimated 2010

¹ Exh. 1 (the oldest child, J, emancipated in June 2008, so the amount was adjusted to \$1,414 per month for two children based on the calculation at Exh. 1, pg. 7).

² Exh. 2.

³ Exh. 3.

⁴ Exh. 4.

income did not result in a 15% change in the support amount set in his prior order.⁵ Mr. E appealed on January 5, 2011, asserting his income was lower than in prior years.⁶ On January 18, 2011, Mr. E provided his year-end income information for 2010.⁷ Before the hearing, CSSD submitted a draft 2010 child support calculation of \$1,068 per month for two children based on Mr. E's actual 2010 income.⁸

B. Material Facts

Mr. E currently works as a maintenance electrician for the No Name Corporation. He previously was a construction electrician, but that job was dependent on the inconsistent construction schedule of his employer so Mr. E made the decision to change jobs and work as a maintenance electrician. He testified the latter position pays less but it is much more dependable and stable.

In 2010, Mr. E's actual income was \$59,190.70, which consists of \$54,354.70 in earnings; the PFD of \$1,281; and \$3,555 in unemployment benefits.⁹ With the correct deductions for taxes, Social Security/Medicare, retirement¹⁰ and unemployment insurance, his adjusted annual (net) income for 2010 was \$44,600.98, which yields a child support amount for 2010 of \$1,004 per month for two children (\$743 per month for one child).¹¹

Mr. E currently works a 2 weeks-on/2 weeks-off schedule. Each week he works 40 hours at the straight time rate of \$31.50 per hour plus 40.5 hours at the overtime rate of \$47.25 per hour.¹² These work hours result in weekly income of \$1,260 + \$1,913.62, which totals \$3,173.62. His monthly income is twice that amount, or \$6,347.24, because he works two weeks out of each month. This monthly earnings amount yields an estimated annual income figure for

⁵ Exh. 5.

⁶ Exh. 6.

⁷ Exh. 7.

⁸ Exhs. 9-10. CSSD withdrew this calculation at the hearing because the agency had failed to include a deduction for his retirement contribution.

⁹ Exh. 7 at pg. 2 & Exh. 8 at pgs. 1-2.

¹⁰ Mr. E pays 2.98% of his income into a retirement account. *See* Exh. 7 at pg. 2: total retirement deductions of \$939.67 ÷ gross pay of \$31,586.97 = .0298 x 100% = 2.98%.

¹¹ Exh. 12.

¹² Testimony of Mr. E; Exh. 4 at pgs. 9-16.

2011 of \$76,166.88.¹³ From that annual income, his child support obligation for two children in 2011 is calculated at \$1,294 per month.¹⁴

III. Discussion

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹⁵ 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. As the person who filed the appeal in this case, Mr. E has the burden of proving by a preponderance of the evidence that CSSD issued the Notice of Denial of Modification Review in error.¹⁶

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." CSSD initially denied Mr. E's request for modification for the reason that the agency's estimate of his 2010 income resulted in a child support amount that was not a 15% change from the child support amount previously ordered in his case. However, Mr. E's total 2010 income has been established and a child support calculation of \$1,004 per month results from his income. This figure is more than a 15% change from the prior amount of \$1,414 per month, the two-child amount from Mr. E's prior order of \$1,728 for three children.¹⁷ As a result, Mr. E's child support obligation should be modified.

Mr. E accepted the child support calculations generated at his second hearing. Ms. E did not. She maintains he is voluntarily underemployed and as evidence of her position, claims he told family members that he changed to the lower-paying job in 2010 “to make [her] life more miserable.”¹⁸ Ms. E did not submit statements from those family members.

In cases in which a party claims the obligor parent is voluntarily unemployed or underemployed, the administrative law judge must determine whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed” or underemployed.¹⁹

¹³ The math was verified and corrected where necessary during the hearing held on May 2, 2011.

¹⁴ Exh. 15.

¹⁵ AS 25.27.190(e).

¹⁶ 15 AAC 05.030(h).

¹⁷ See Exh. 1 at pg. 7 (Attachment A to the child support decision adopted as final on September 2, 2008).

The percentage change looks like this: $\$1,414 \times .20 = \282.80 ; $\$1,414 - \$282.80 = \$1,131.20$.

¹⁸ Ms. E's final argument, received on May 4, 2011.

¹⁹ Bendixen v. Bendixen, 962 P.2d 170, 172 (Alaska 1998).

The first step is to determine if the parent is voluntarily unemployed or underemployed. Mr. E testified that he changed jobs from being a construction electrician to working as a maintenance electrician. His change in employment was thus voluntary.

The second step in the analysis is to determine whether the parent's change of employment was unreasonable. An integral part of the analysis is whether the parent's lack of employment or underemployment is a result of "economic factors," as in being laid off, or of "purely personal choices."²⁰ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith.²¹

The Alaska Supreme Court further explained the essence of the analysis in *Beaudoin v. Beaudoin*²² by stating that "the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning." At the same time, however, the court thought it important to point out that:

. . . Rule 90.3(a)(4) does not rigorously command pursuit of maximum earnings. The rule's more modest objective is to give courts broad discretion to impute income based on realistic estimates of earning potential in cases of voluntary and *unreasonable* unemployment or underemployment.^[23]

The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support "shall consider the totality of the circumstances" in deciding whether a parent is voluntarily and unreasonably unemployed or underemployed."²⁴

As to the question whether Mr. E's decision to change jobs was reasonable, Mr. E stated that he made the change because the latter job is more stable, reliable and it does not depend on the vagaries of his employer's construction schedule.

Ms. E claims Mr. E's decision was not reasonable essentially because it was a way of reducing his child support obligation and making her life more miserable. Ms. E cites to the commentary to Civil Rule 90.3, which states that "A temporary reduction in income normally

²⁰ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²¹ *Kowalski*, 806 P.2d at 1371.

²² 24 P.3d 523 (Alaska 2001).

²³ *Beaudoin*, 24 P.3d at 528 (emphasis in original).

²⁴ Civil Rule 90.3, Commentary III.C.

will not justify an ongoing modification reducing child support.”²⁵ She is claiming that his reduced income at the end of 2010 should not result in a lower child support amount, apparently because his income went up again in 2011. What Ms. E has not addressed is the fact that although Mr. E’s total 2010 income was lower than it is expected to be in 2011, it was primarily because he was not employed by no name during all of the second quarter and most of the third quarter of 2010,²⁶ having most recently been hired in his current job on September 3, 2010.²⁷ As soon as he started back to work for no name he was making \$31.50 per hour and working a full 2 weeks-on schedule.²⁸ Thus, Mr. E’s income at the end of 2010 was not a temporary reduction, as claimed by Ms. E; rather, his income at the end of 2010, about the time this modification became effective, went up to about \$6,347 per month and has stayed there. In fact, Mr. E’s support obligation remained at \$1,414 per month while his income for the entire second quarter of 2010 was just \$6,947.50, or \$2,315.83 per month for those three months.²⁹

The evidence in its entirety shows that although Mr. E made a voluntary decision to change jobs, his decision was not unreasonable. He was unemployed for several months during mid-2010 and decided to take a somewhat lower paying job, but one that provided him with a consistent schedule and reliable income. Therefore, based on the “totality of the circumstances,” Mr. E is not voluntarily and unreasonably underemployed. His child support should be modified based on his actual income for 2010 and further modified as of 2011 to reflect his expected annual income for the year. These amounts are discussed in the facts section.

IV. Conclusion

Mr. E met his burden of proving by a preponderance of the evidence that CSSD's Notice of Denial of Modification Review was issued in error. CSSD incorrectly estimated his total income for 2010 and in addition he is not voluntarily and unreasonably underemployed. His actual income should be the basis of the child support calculations. Using Mr. E’s actual 2010 income results in a correct child support amount of \$1,004 per month for two children (\$743 per

²⁵ Civil Rule 90.3, Commentary X.A.

²⁶ Exh. 8 at pg. 1.

²⁷ See Exh. 4 at pg. 11.

²⁸ Exh. 4 at pg. 11.

²⁹ Exh. 8 at pg. 1.

month for one child), effective October 1, 2010.³⁰ Using his estimated 2011 income, his ongoing child support should be set at \$1,294 per month for two children (\$959 per month for one child), effective January 1, 2011. These figures should be adopted.

V. Child Support Order

- CSSD's December 2, 2010, Notice of Denial of Modification Review is vacated;
- Mr. E's child support obligation for V and C is modified to \$1,004 per month for two children (\$743 per month for one child), effective October 1, 2010; and further modified to \$1,294 per month for two children (\$959 per month for one child), effective January 1, 2011 and ongoing.
- All other provisions of the prior order in effect in Mr. E's case, the Decision and Order *In the Matter of G T. E*, OAH No. 08-0154-CSS, adopted as a final decision on September 2, 2008, remain in full force and effect.

DATED this 5th day of May, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

³⁰ A modification is effective the first day of the month following CSSD's notice to the parties that a modification has been requested. 15 AAC 125.321(d). In this case, CSSD issued the notice on September 28, 2010, which makes the modification effective as of October 1, 2010. See Exh. 3.

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 23rd day of May, 2011.

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

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