

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

IN THE MATTER OF)	
B P W)	OAH No. 11-0039-CSS
)	
_____)	CSSD No. 001152311

DECISION AND ORDER

I. Introduction

This case is B P. W's appeal of the Division's modification of his \$161 per month ongoing child support order for his child X, which raised the monthly amount to \$593. On March 17, 2011, after several postponements to accommodate Mr. W's busy fishing schedule, a formal hearing was held to consider Mr. W's appeal.¹ Mr. W appeared. The custodial parent, S. B, also participated in the hearing. Andrew Rawls, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed on March 31, 2011.

Having reviewed that record and after due deliberation, I have concluded that the Division's Modified Administrative Child and Medical Support Order issued on January 4, 2011, should be affirmed. This means that Mr. W's modified ongoing child support will remain at \$593 per month per month effective November 1, 2010.

II. Facts

A. History

Mr. W's monthly child support obligation was set at \$161 per month in 2008.² The Division reviewed this child support order at Ms. B's request through a Uniform Interstate Family Support Act (UIFSA) Petition from the State of Washington.³ The Division issued a Notice of Petition for Modification on October 21, 2010.⁴

¹ The hearing was held under Alaska Statute 25.27.190.
² Exhibit 1.
³ Exhibit 2.
⁴ Exhibit 3.

The Division issued a Modified Administrative Child and Medical Support Order on January 4, 2011.⁵ The Division determined that Mr. W's ongoing monthly child support should be increased to \$593 per month. The Division based its calculation of Mr. W's modified ongoing monthly child support on his 2010 estimated income using fish harvest information from the Alaska Department of Fish and Game.⁶

Mr. W requested a formal hearing.⁷ At the hearing, Mr. W contested the Division's calculations, explaining that he only received a portion of the value of the catch reflected on the reports that he filed in 2010.⁸

After the hearing, a post hearing order was issued giving the parties until March 31, 2011 to provide any additional information. The Division filed more complete income information that Mr. W had sent to the Division on the day of the hearing.⁹

B. Findings

Based on the evidence in the record, I find that Mr. W's failed to show that it was more likely than not that the Division's calculations are not based on the best estimate of his income and earning capacity, or that results of those calculations, setting Mr. W's ongoing support obligation under Alaska Civil rule 90.3(a) is \$593 per month, are correct.¹⁰

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. W, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹¹ Mr. W failed to provide any reliable estimate of his income in 2010 or 2011. Mr. W did not show that the Division's order is incorrect. The evidence in the record indicates that the Division may have underestimated Mr. W's income and earning capacity rather than overestimating it as argued by Mr. W. The Division repeatedly asked Mr. W to provide his tax returns and W-2's. Mr. W repeatedly had the hearing rescheduled because he was fishing. Mr. W has not provided tax returns, W-2s or complete documentation of his annual income. Instead he provided partial

⁵ Exhibit 4.

⁶ Exhibit 6.

⁷ Mr. W's appeal is found at Exhibit 5.

⁸ Recording of Hearing - Testimony of Mr. W.

⁹ Exhibit 7.

¹⁰ Exhibit 4, page 6 & Recording of Hearing.

¹¹ Alaska Regulation 15 AAC 05.030(h).

records of his 2010 income. The income information Mr. W did provide intentionally understated his 2010 income.¹²

At the hearing, Mr. W replied untruthfully under oath when he responded to the question: “So for 2010 how much did you receive in income?” Although this was the central issue of his appeal, Mr. W first testified that he “did not keep a memory of that.” Mr. W then referred to some paperwork that he had submitted prior to the hearing and testified that “it was \$10,395.97.” Later in the hearing, when confronted with the fact that this figure only covered his share of the fishing income for two months of 2010, Mr. W admitted that he had fished in other months of 2010, but he claimed that he had no idea what he earned.¹³

When a parent with a child support obligation makes an accurate determination of his or her income impossible, income must be imputed to calculate the child support obligation. The criteria used to estimate the proper amount of income to impute are the same as those used in a case where the noncustodial parent is voluntarily and unreasonably unemployed or underemployed. Rather than determining the parent’s actual income, the parent’s earning capacity is used to estimate the parent’s potential income.¹⁴ If the \$10,395.97 that Mr. W admitted to making in just two months of 2010 is annualized by multiplying it by six, the resulting annual income would exceed \$60,000. The Division used only \$42,535.25 in estimated annual earnings when it calculated Mr. W’s modified ongoing child support obligation.

Furthermore, if as Mr. W testified at the hearing, he is gainfully employed for less than twelve months per year as a fisherman and has not bothered to look for other work, it would be appropriate to impute income to him due to voluntarily and unreasonably underemployment.¹⁵ Mr. W testified that before he moved to Alaska, he earned over \$70,000 a year as a truck driver. Mr. W also testified that he gets room and board on the fishing boat year-round as a benefit of his current employment as a fisherman. The evidence shows that Mr. W is probably earning at least the income that the Division used to calculate his modified ongoing child support, and that if he is not earning that much, he is unreasonably underemployed.

Generally, a new monthly child support amount in a modification action should be effective the month after the parties are served with the petition. This modification should be

¹² Recording of Hearing - Testimony of Mr. W & Exhibits 5 & 7.

¹³ Recording of Hearing - Testimony of Mr. W.

¹⁴ *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

effective November 1, 2010, because the petition was served in October of 2010.¹⁵ Although Mr. W complained in his appeal that the effective date of the modification put him in arrears, he was placed on notice when the petition was issued that his child support could increase and therefore was given the opportunity to plan his finances by saving to pay for any increase.

IV. Conclusion

I conclude that the Mr. W's ongoing child support should be modified to \$593 effective November 1, 2010, based on his current income and earning capacity.

V. Child Support Order

The Division's Modified Administrative Child Support and Medical Support Order issued on January 4, 2011, is affirmed.

DATED this 5th day of April, 2011.

By: *Signed* _____
Mark T. Handley
Administrative Law Judge

¹⁵ See Alaska Civil Rule 90.3, Commentary III, C.

¹⁶ Alaska Regulation 15 AAC 125.321.

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 22nd day of April, 2011

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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