

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

IN THE MATTER OF)	OAH No. 11-0048-CSS
H R. S)	CSSD No. 001139430
)	
_____)	

DECISION AND ORDER

I. Introduction

This case is L Y’s appeal of the modification of Mr. H R. S’s existing child support order for his children, K and C. Ms. Y is the children’s mother. The Child Support Service Division (Division) issued the modification order at Mr. S’s request. The Division modified Mr. S’s ongoing child support obligation by setting it at the minimum monthly amount of \$50 based on his incarceration.

Ms. Y requested a formal hearing. This request was referred to the Alaska Office of Administrative Hearings. Administrative Law Judge Mark T. Handley was assigned to conduct the formal hearing, which was held on February 24, 2011. Mr. S and Ms. Y both participated. Andrew Rawls, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed at the end of the hearing.

At the hearing, Ms. Y argued that the Division should not have reduced Mr. S’s child support order because it was his fault that he was incarcerated and because he was still able to make payments on his land and union dues.

Having reviewed the record in this case and after due deliberation, I conclude that the Division’s modification order, which is the subject of this appeal, should be upheld. Ms. Y should file a request that Mr. S’s ongoing child support be modified again to reflect his earning capacity as soon as he is able to earn income again.

II. Facts

This case is modification action.¹ Mr. S’s ongoing child support for his children, K and C was previously set in 2010 at \$1,746 per month based on his income.²

The Division initiated a modification action at Mr. S’s request, which was received on

¹ Alaska Civil Rule 90.3(h) governs modification actions.

² Exhibit 1 & the Division’s Pre-Hearing Brief, page 1.

November 1, 2010.³ Mr. S filed the request because he has been incarcerated since September of 2010 on two felony charges.⁴

The Division issued notice of the petition for modification on November 12, 2010.⁵ The Division issued a Modified Administrative Child and Medical Support Order on January 12, 2011.⁶

The Division's order set Mr. S's ongoing child support obligation at \$50 per month, for two children effective December 1, 2010.⁷

Ms. Y requested a formal hearing. In her appeal and at the hearing, Ms. Y explained that she has had to work overtime to provide for the children. Ms. Y also explained that she has had to borrow money to provide for the children. Ms. Y argued since Mr. S still has assets such as his retirement account and some land, and has been making payments on his land, his truck, his union dues and his storage unit while he has been in jail, he can afford to provide more for the children's ongoing child support than \$50 per month.⁸

Mr. S has been in jail since September of 2010. Mr. S usually works year-round as union plumber and pipe-fitter. Mr. S has not yet been convicted or sentenced, but he estimated that he will either be sentenced for a term of about two years, or if he is referred to wellness court he will be sentenced to out-patient treatment that would last 18 months.⁹

Mr. S estimated that if he is sentenced to two years that he would be eligible to be sent to a half-way house and start being able to earn some income before this summer. Mr. S believes that if he is referred to wellness court he would be able to start working again even sooner. Mr. S testified that he is no longer making truck payments because he no longer has a truck. Mr. S explained that he had prepaid his union dues, that a friend is paying his land payments as a loan, and that his mother is paying for his storage unit.¹⁰

³ Exhibit 2 & Division's Pre Hearing Brief.

⁴ Recording of Hearing-Testimony of Mr. S.

⁵ Exhibit 3.

⁶ Exhibit 5.

⁷ The Division's Pre-Hearing Brief, page 1 & Exhibit 5.

⁸ Exhibit 6 & Recording of Hearing-Testimony of Ms. Y.

⁹ Recording of Hearing-Testimony of Mr. S.

¹⁰ Recording of Hearing-Testimony of Mr. S.

Mr. S testified that he did not have sources of income other than what he earns when he is working and Ms. Y agreed that this was true.¹¹

Based on the evidence in the record , I find that Ms. Y did not show that it was more likely than not that the Division's calculations used to set his modified ongoing child support or the income used in those calculations were incorrect.¹²

III. Discussion

In a child support hearing, the person who filed the appeal, in this case, Ms. Y has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹³ Ms. Y did not show that the Division's modification order was incorrect.

The Division correctly reduced Mr. S's support to the minimum amount of \$50 per month based on Mr. S's continued lack of income due to his incarceration. The law requires that child support be set at no less than \$50 per month and the Alaska Supreme Court has said that a minimum order is generally appropriate when an obligor is incarcerated.¹⁴

It would not be appropriate to set Mr. S's ongoing child support higher than the minimum by imputing income to him based on a finding of voluntary underemployment. Not every voluntary act that has negative economic consequences amounts to unreasonable voluntary under-employment. Once it has been demonstrated that an obligor can no longer earn an income, it is not appropriate to impute income to him.¹⁵

Mr. S does not have realistic prospect of earning significant income before his release to a halfway house or his referral to wellness court. Imputing income based on a finding of "voluntary under-employment" under the circumstances of this case would run counter to the direction under Civil Rule 90.3 that child support should be based on an obligor's income.

¹¹ Recording of Hearing-Testimony of Mr. S & Ms. Y.

¹² Recording of Hearing.

¹³ Alaska Regulation 15 AAC 05.030(h).

¹⁴ See *Bendixen v. Bendixen*, 962 P.2d 170 (Alaska 1998) & *Douglas v. State, Department of Revenue* 880 P.2d 113 (Alaska 1994).

¹⁵ *Bendixen v. Bendixen*, 962 P. 2d 170 (Alaska 1998).

V. Child Support Order

The Division’s Modified Administrative Child and Medical Support Order issued on January 12, 2011, is affirmed.

DATED this 26th day of February, 2011.

By: Signed
Mark T. Handley
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 17th day of March, 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.]