

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

IN THE MATTER OF:)

S D. R)

OAH No. 11-0171-CSS

CSSD No. 001049288

DECISION AND ORDER

I. Introduction

The custodial parent, E A. W appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD). The obligor parent is S R. The child in this case is B D. R.

A hearing was held on May 26, 2011. Ms. W and Mr. R each appeared by telephone. CSSD was represented in person by Child Support Specialist Andrew Rawls. The record was left open for two weeks to allow the parties time to submit additional documents and written argument. Mr. R submitted additional written argument and evidence.

Based on the evidence in the record, Mr. R's child support obligation should not be modified because he is voluntarily and unreasonably underemployed.

II. Facts

A. Background

A Modified Administrative Child Support and Medical Support Order was issued on October 13, 2010.¹ That order set Mr. R's support obligation at \$565 per month. Mr. R requested a modification on February 7, 2011.² A Notice of Petition for Modification of Administrative Support Order was mailed on February 17, 2011.³ A Modified Administrative Child Support and Medical Support Order was issued on April 1, 2011, setting Mr. R's child support obligation at \$50 per month.⁴ Ms. W appealed, alleging that Mr. R was voluntarily and unreasonably unemployed.⁵

¹ Exhibit 1.
² Exhibit 2.
³ Exhibit 3.
⁴ Exhibit 5.
⁵ Exhibit 6.

B. Material Facts

Mr. R is a member of the Pipe Layer's Union and works as a foreman or supervisor.⁶ Until recently, he had been on probation from a prior criminal conviction. In March his probation officer informed him that he was in violation of his probation and ordered Mr. R to return to custody. He has been in state custody since March 10, 2011, and has been sentenced to serve the remainder of his sentence.⁷ Mr. R will not be released from prison until July of 2012.

Before returning to prison, Mr. R had frequent employment, as well as periods in which he received unemployment compensation.⁸ His terms of probation did interfere with his employment, however. He was required to obtain a travel pass before working out of the area where he lived. In addition, he was required to participate in a treatment program every Tuesday morning at 7:30. Mr. R now works in the kitchen at No Name Correctional Center. He started out earning \$89 per month, but will eventually receive pay raises that allow him to earn up to \$130 per month.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.⁹ 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."¹⁰ 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 required to do so. A modification is effective beginning the month after the parties are served with notice that a modification has been requested.¹¹ Finally, the person appealing CSSD's decision has the burden of demonstrating that the decision is incorrect.¹²

⁶ Unless otherwise noted, these facts are taken from Mr. R's testimony.

⁷ Exhibit 8.

⁸ Exhibit 7.

⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁰ AS 25.27.190(e).

¹¹ 15 AAC 125.321(d).

¹² 15 AAC 05.030(h).

The question in this case is whether Mr. R is voluntarily and unreasonably unemployed or underemployed. If he is, potential income may be imputed to him for the purpose of calculating child support.¹³ In this case, Mr. R is employed while he is incarcerated. Thus, the focus is on whether he is voluntarily and unreasonably underemployed.

A parent is voluntarily underemployed if the lack of better employment is due to purely personal choices rather than economic factors.¹⁴ Voluntary underemployment may be found even if there is no purposeful intent to avoid child support. The question is whether the “parent’s current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.”¹⁵ A parent “is free to change jobs and careers, but the custodial parent and child should not have to finance the obligor parent’s employment and lifestyle choices.”¹⁶

Mr. R argues that he currently holds one of the highest paying jobs available to inmates in the correctional facility. Thus, he is not underemployed; he is earning as much as possible in his circumstances. Generally, that would be enough to show that he is not underemployed. There is a unique twist to Mr. R’s circumstances, however. Exhibit A was submitted with Mr. R’s post-hearing filing and is a portion of an affidavit in support of the petition to revoke Mr. R’s probation. That affidavit states:

On or about March 10 2011, the defendant violated general condition of probation #3 by leaving the region of residence to which he was assigned.

On that date, Probation Officers received information from Mr. R’s wife (A R) that he was in the no name area. She stated that he had hitchhiked to the no name with the goal of remanding himself at the No Name courthouse. This officer contacted Mr. R on his cell phone and confirmed that he had traveled to no name without prior permission from his probation officer. He was instructed to report immediately to the No Name Probation Office where he was remanded and transported to No Name Correctional Center.^[17]

Once Mr. R was told by his probation officer to report to the No Name Probation Office, he had no reasonable choice to do anything else. From there, it was inevitable that he would be charged with violating a condition of probation. According to Mr. R’s testimony during the

¹³ Civil Rule 90.3(4).

¹⁴ *Nunley v. State*, 99 P.3d 7, 11(Alaska 2004); *In re N.T.C.*, OAH No. 11-0038-CSS (Dept of Revenue 2011).

¹⁵ *Nunley*, 99 P.3d at 12.

¹⁶ *In re N.T.C.*, page 4.

¹⁷ Mr. R’s Exhibit A. This is consistent with the notes in Exhibit 8, which suggests that Mr. R wanted to serve the rest of his time.

hearing, this was his third violation and there was no opportunity to avoid incarceration at that point.

Once he confirmed to his probation officer that he was in No Name, incarceration was inevitable, but Mr. R did have a choice prior to hitchhiking to No Name. He made the choice to go to No Name for the purpose of violating his probation and being remanded to prison. Because he is in prison, his earning capacity is substantially lower than it was previously.¹⁸ Mr. R's current situation is the result of a purely personal choice to return to prison to serve the remainder of his sentence. He has made a voluntary decision to put himself in a situation where he will earn less than he is capable of earning. Under the circumstances, his decision to become underemployed is also unreasonable. While he may personally prefer prison to the restrictions imposed by his probation, his child should not have to finance that lifestyle choice.

Further evidence that Mr. R intended to become incarcerated can be seen on his Request for Modification.¹⁹ This document is dated February 7, 2011. At the bottom, Mr. R included a handwritten note indicating that he would be incarcerated on February 20th, continuing for 16 months. He knew in advance that he would be violating his probation and that he would be returned to prison to serve the rest of his sentence.²⁰ He knew he would be putting himself in a position where his ability to earn income would be substantially reduced.

Because Mr. R is unreasonably and voluntarily underemployed, his child support obligation should be based on his potential income. The average of his wages in 2010 and 2009 is \$39,124.18. This does not include a PFD or any unemployment benefits. Based on this potential income, his child support obligation would be \$545 per month for one child.²¹ Because this is not at least 15% lower than his current support obligation, there is no material change of circumstances, and his support obligation should not be modified.

IV. Conclusion

Ms. W has met her burden of proving that CSSD's decision to modify Mr. R's support obligation was incorrect. Based on his potential income, there has not been a material change of

¹⁸ In 2010, he earned \$41,482.19 in wages and \$12,227.72 in unemployment benefits. In 2009, he earned \$36,766.16 in wages, and \$4,955 in unemployment benefits. Exhibit 7.

¹⁹ Exhibit 2.

²⁰ It appears his plans were delayed as he did not commit his probation violation until March 10.

²¹ Attachment A.

circumstance justifying a modification of Mr. R's support obligation. His support obligation should remain at \$565 per month for one child.

V. Child Support Order

- Mr. R remains liable for child support in the amount of \$565 per month.
- All other provisions of the October 13, 2010 Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 13th day of June, 2011.

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 7th day of July, 2011.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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