

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

IN THE MATTER OF:)

T Z)

OAH No. 11-0181-CSS

CSSD No. 001167722

REVISED DECISION AND ORDER AFTER REMAND

I. Introduction and Procedural Background

This matter first came before the Office of Administrative Hearings when the Obligor, T Z, appealed the Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on January 27, 2011.¹ The Obligee child is M. The Custodian of record is K N.

A hearing was held on Mr. Z's appeal on May 31, 2011. Mr. Z appeared by telephone and represented himself, Ms. N participated through counsel, and Child Support Specialist Erinn Brian appeared for CSSD. The record remained open to allow the parties an opportunity to supplement the record. The record closed June 15, 2011 without further submission from any party to the proceeding.

As permitted by statute, Mr. Z exercised his opportunity to file a post hearing proposal for action (PFA).² He wrote that he had experienced a change in circumstance, that he was incarcerated, and that he believed should reduce his monthly child support obligation as recommended in the proposed decision and order. The Deputy Commissioner of Revenue exercised his authority and returned the case to the Office of Administrative Hearings (OAH) with instructions to take additional evidence on Mr. Z's employment and income.

A hearing on remand was scheduled and the parties were informed that the scope of the hearing would be limited to the taking of:

additional evidence regarding Mr. Z's employment and income. In his proposal for action Mr. Z indicated that his financial situation has changed as he is presently incarcerated. At the hearing on remand Mr. Z should be prepared to

¹ Exhibit 7. Mr. Z requested an administrative review. Mr. Z's request for a review was denied because did not provide the requested income and the Administrative Child Support and Medical Support Order was affirmed. Exhibit 9.

² AS 44.64.060(e).

address how long he will be incarcerated, whether he has any sources of income, and his employment upon release.³

The hearing on remand was intended to allow an inquiry into Mr. Z's current situation and determine if there had been a change in circumstances that would require an adjustment in the amount of child support recommended.

At the hearing on remand Mr. Z testified that he was no longer incarcerated and was looking for work. He explained that his situation at the time of the hearing on remand was the same as it had been at the time of the May 31, 2011 hearing.

Prior to the hearing on remand, Ms. N submitted information to challenge Mr. Z's testimony regarding his income in 2010. Ms. N did not argue that Mr. Z's situation has changed from what it was prior to his incarceration, rather she attempts to establish that Mr. Z understated his income in the initial proceeding.⁴

In support, Ms. N submitted log notes from a December civil proceeding.⁵ These log notes are unauthenticated and may be incomplete. That section of the log notes addressing income deviates from the format contained on the other pages of log notes because on the other pages if the sentence is longer than one line the text wraps. The one of import to Ms. N does not. The log note provides "Have an obligation to get a sense of annual wages to determine the parties don't make more than" and it does not continue, it stops.⁶ The next entry is attributed to Mr. Z is "\$35,000 per year."⁷ The unauthenticated log notes are of scant evidentiary value and do not address whether Mr. Z's circumstances have changed post hearing such that the initial recommended child support decision and order should be revised or otherwise changed.

For these reasons, the additional evidence received at the supplemental hearing is not persuasive and the findings and conclusions contained in the proposed decision and order distributed July 5, 2011, and returned by order of the Deputy Commissioner of Revenue on July 25, 2011 should be adopted with minor revision reflected below.

³ Order Setting Hearing on Remand (August 2, 2011).

⁴ It is noteworthy that Ms. N did not file a PFA asserting Mr. Z's income was understated.

⁵ Exh. A.

⁶ Compare Exh. A. at 4 (text ends) with the first line of Exh. A. at 3 (text wraps).

⁷ Exh. A at 4.

II. Facts

Mr. Z contacted CSSD and requested services on June 8, 2010.⁸ After genetic testing was complete, CSSD issued an order establishing that Mr. Z was the father of M and requested financial information.⁹ Mr. Z provided income information for 2009 but none for 2010 or 2011. CSSD based his 2010 income for purposes of child support on his 2009 earnings (\$13,594) and, after finding Mr. Z voluntarily unemployed imputed income to him for 2011. CSSD based its child support calculation for 2011 on Mr. Z working full time (2080 hours) at minimum wage (\$7.75) for annual earnings totaling \$16,120.¹⁰ CSSD did not include the Alaska Permanent Fund dividend in either calculation. Using these figures (\$13,549 for 2010 and \$16,120 for 2011), CSSD calculated his child support obligation for one child to be \$202 per month effective April 2010 through December 2010 and, effective January 2011 and ongoing, a monthly child support amount of \$242.

Mr. Z testified that he was currently unemployed and under third-party custody while he awaits trial for an assault charge. He commercial fishes but hopes to get a welding job in the future. His third party custodian is his captain. Mr. Z explained that after his expenses were deducted he expected to earn approximately \$16,000 from fishing in 2011, the same amount he made in 2010. Mr. Z did not present his crew share accounting. For reason's not reflected in the record CSSD opted not to impute income to him based on the Occupational Employment Statistics (OES) wages for a fishing worker: \$35,200 per year.¹¹ Mr. Z asked that his income for his child support obligation not be treated as seasonal but rather a level amount each month.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.¹² Civil Rule 90.3(a)(1) provides that an Obligor's child support payment is to be calculated based on his or her "total income from all sources." A very limited number of expenses may be deducted from income."¹³

⁸ Exhibit 1.

⁹ Exhibit 5.

¹⁰ Exhibit 7 at 4 – 5.

¹¹ 15 AAC 25.050; Exhibit 5 at 4, 5.

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

¹³ Civil Rule 90.3, Commentary III D.

Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by [the tribunal] to be inappropriate. Expense reimbursements and in-kind payments such as ...reimbursed meals should be included as income if the amount is significant and reduces living expenses.¹⁴

Therefore, a crew member may not be able to deduct all of the business expenses reported to the IRS when calculating child support.

Mr. Z has the burden of proving by a preponderance of the evidence that the monthly child support obligation calculated by CSSD is incorrect.¹⁵ Mr. Z testified that his actual wages in 2010 were \$16,000 and that he expected to earn the same amount in 2011.

CSSD's 2010 calculation was based upon his 2009 income which was \$13,594. This is less than his actual income for 2010 so Mr. Z has met his burden of proving that it is more likely than not that CSSD understated his income in 2010.

However, for 2011 CSSD imputed an annual gross income in the amount of \$16,120. It arrived at this figure after finding Mr. Z to be voluntarily unemployed or underemployed for 2011 and imputing income at the minimum wage.¹⁶ This amount appears reasonable when measured against Mr. Z's testimony.

Child support determinations calculated under Civil Rule 90.3 from an Obligor's actual income are presumed to be correct. Under the facts presented, Mr. Z's monthly child support obligation for one child should be \$234 effective April 2010 based on an annual gross income amount of \$16,000.

At the hearing Mr. Z indicated that any child support obligation in excess of \$185 per month would result in a hardship. An Obligor parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish "good cause," the claimant must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."¹⁷ Mr. Z has not introduced evidence sufficient to establish that child support based on his actual income would result in manifest injustice if it were not varied.

¹⁴ Civil Rule 90.3, Commentary III B.

¹⁵ 15 AAC 05.030(h).

¹⁶ Exhibit 9 at 2.

¹⁷ Civil Rule 90.3(c).

IV. Conclusion

Mr. Z's gross annual income for purposes of calculating his child support should be \$16,000 in 2010 and 2011 based on his unchallenged testimony regarding actual and expected earnings. Therefore, his monthly child support obligation should be \$234 per month effective April 1, 2010. (Attachment A)

V. Child Support Order

- T Z liable for child support in the amount of \$234 per month effective April 1, 2010 and ongoing.
- All other provisions of the Administrative Child Support and Medical Support Order issued January 27, 2011, remain in full force and effect.

DATED this 13th day of September, 2011.

By: Signed
Rebecca L. Pauli
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 22nd day of September, 2011.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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