

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

In The Matter of:)	
)	OAH No. 11-0230-CSS
D J. W)	CSSD No. 001145632
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)	

DECISION AND ORDER

I. Introduction

The obligor parent, D J. W, appeals a Notice of Denial of Modification Review that the Child Support Services Division (CSSD) issued in her case on May 6, 2011. The obligee child is N, 6 years of age.

The formal hearing was held on June 30, 2011. Ms. W appeared in person. This is a foster care case so the other party is the State of Alaska. 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 affirmed. Ms. W is currently unemployed but there is no evidence in the record to suggest that this unemployment will be anything other than temporary. On that basis, there is insufficient evidence to establish that Ms. W has had a material change in circumstances such that her child support should be modified. The obligor's child support shall remain at \$234 per month, as set in 2007.

II. Facts

A. Background

Ms. W's child support obligation for N was set at \$234 per month in February 2007.¹ On February 25, 2011, Ms. W requested a modification review.² On March 9, 2011, CSSD issued a Notice of Petition for Modification of Administrative Support Order.³ On May 6, 2011, issued a Notice of Denial of Modification Review that denied Ms. W's petition for modification for the reason that her income did not yield a child support amount that was at least 15% higher than the previous amount.⁴ Ms. W filed an appeal on June 8, 2011, asserting her child support was set at

¹ Exh. 1.
² Exh. 2.
³ Exh. 3.
⁴ Exh. 4.

\$234 per month while she was employed and that she has been home with a young child for three years so she should not be charged at the “employed” rate.⁵

B. Material Facts

At the hearing, Ms. W described her current circumstances. The child in this case, N, 6 years of age, is in foster care with Ms. W’s mother, who moved to Washington three years ago. Ms. W travels there to visit the child regularly. As a result, she has expended a significant amount of money on visitation expenses that she cannot afford along with the child support obligation. She regularly spends 7-10 days at a time with N.

Ms. W is currently unemployed; her last employer was in the food service industry about five years ago. She worked for minimum wage and tips. In order to support herself, the obligor does work on the side such as babysitting and mowing lawns. She also gets help from her relatives, who pay her rent of \$800 per month.

Ms. W and her husband, Justin, have been married for 2 ½ years. They have a three-year-old daughter who is just now getting ready to go into preschool. Justin is also unemployed but neither of them have any significant health problems or disabilities. He recently helped take care of his elderly grandmother in his parent’s home. His usual occupation is as a laborer.

Ms. W has been job hunting now that her younger daughter is old enough to go to preschool. The obligor has some experience as a personal care attendant in addition to office work, but it is difficult for her to find employment. She testified that four out of five potential employers have declined to give her work because of the amount of time she spends on visits to N in Washington.

III. Discussion

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.”⁶ 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

⁵ Exh. 5.

⁶ AS 25.27.190(e).

required to do so. The person requesting the hearing, in this case, Ms. W, has the burden of proving that CSSD's Notice of Denial of Modification Review was issued in error.⁷

Ms. W's child support was set at \$234 per month for N in 2007. Ms. W claims that the amount was based on her employment at the time, but in actuality, CSSD imputed income to her using the minimum wage.⁸ The total annual income from the minimum wage was \$14,872, which yielded a child support amount of \$234 per month.⁹ There is no indication in the record that the obligor appealed that determination.

For the current modification request, CSSD once again did not have income information for Ms. W. Thus, CSSD again used the minimum wage to impute income to her. The minimum wage has gone up somewhat since then, so annual income using the minimum wage is now \$16,120.¹⁰ Using this income figure in a child support calculation yields a support amount of \$260 per month for one child.¹¹ To qualify for any modification, the current calculation would have to be at least 15% higher than \$234 per month, or, \$269 per month.¹²

An obligor parent has the burden of proving his or her earning capacity.¹³ Ms. W did not appeal her child support order of \$234 per month in 2007, so that became her ability to pay support. Since her support obligation was established at that level, she must meet the legal standard of "good cause and material change in circumstances" in order to obtain a modification.

Ms. W's current situation is much the same as it was in 2007. However, now that her younger child is ready for preschool, the obligor is in a much better situation to try to find employment. Now that she is ready to work and is actively job hunting, it makes little sense to reduce her child support award. Ultimately, there is insufficient evidence to prove that Ms. W's unemployment is anything other than a temporary circumstance. This should not result in the reduction of her child support obligation.¹⁴ It would make better sense for Ms. W to petition CSSD for a default review of the order establishing her support obligation in 2007, pursuant to AS 25.27.195(b).

7 15 AAC 05.030(h).

8 Exh. 1 at pg. 10.

9 *Id.*

10 Exh. 4 at pg. 2.

11 *Id.*

12 $\$234 + 15\% = \269.10 .

13 *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

IV. Conclusion

Ms. W did not meet her burden of proving that the Notice of Denial of Modification Review was issued in error. Ms. W is unemployed at this time, but it is a temporary circumstance that does not justify modifying her child support obligation. Ms. W's order to pay \$234 per month should not be modified. CSSD correctly denied her petition for modification review.

V. Child Support Order

- CSSD's May 6, 2011, Notice of Denial of Modification Review is affirmed;
- Ms. W's child support for N remains at \$234 per month;
- All other provisions of the prior order in Ms. W's case, the Administrative Child Support and Medical Support Order dated February 14, 2007, remain in full force and effect.

DATED this 20th day of July, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

¹⁴ *Patch v. Patch*, 760 P.2d 526 (Alaska 1988). See also *In The Matter Of M.J.V.*, OAH Case No. 09-0181-CSS.

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 8th day of August, 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.]