

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

IN THE MATTER OF)	
S L. C)	OAH No. 11-0270-CSS
_____)	CSSD No. 001138066

DECISION AND ORDER

I. Introduction

On July 27, 2011, a formal hearing was held to consider the child support obligation of Chief Warrant Officer S L. C (Obligor) for the support of his child, A.¹ Chief Warrant Officer C participated in the hearing. The custodial parent, B R. S, also participated. Erinn Brian, Child Support Services Specialist, represented the Child Support Services Division (Division). The hearing was audio-recorded. The record closed on August 19, 2011.

This case is Chief Warrant Officer C's appeal of the Division's order modifying his child support obligation. Based on the testimony presented at the hearing, the administrative law judge concludes that Chief Warrant Officer C's modified ongoing child support should be set at \$848 per month effective July 1, 2011, based on his current income.

II. Facts

This case is a modification action increasing ongoing child support.² Chief Warrant Officer C's existing child support for A was set in 2007 at \$599 per month.³ Ms. S filed a request for modification review in October of 2010.⁴ The Division issued a notice of the petition for modification on November 9, 2010.⁵

Chief Warrant Officer C filed a request for a stay of the modification dated November 28, 2010, with an affidavit from his commanding officer. Chief Warrant Officer C asked for a stay until May 28, 2011. Chief Warrant Officer C made this request because he was being deployed to Iraq.⁶

¹ The hearing was held under Alaska Statute 25.27.190.
² Alaska Civil Rule 90.3(h) governs child support modification actions.
³ Exhibit 1.
⁴ Exhibit 2.
⁵ Exhibit 3.
⁶ Exhibit 4.

On June 2, 2011, after his return from Iraq, Chief Warrant Officer C provided his 2010 tax return.⁷

The Division apparently did not respond to Chief Warrant Officer C's request for a stay or contact him again before it modified his ongoing child support order. Apparently, the Division simply waited until after May 28, 2011 and issued a Modified Administrative Child Support and Medical Support Order on June 9, 2011 without any further input from the parents.⁸

In the Modified Administrative Child Support and Medical Support Order, Chief Warrant Officer C's modified ongoing child support was increased to \$797 per month. The Division made this change made effective December 1, 2010, which is during the period that Chief Warrant Officer C had asked that the modification proceedings be stayed because he was in Iraq. This new monthly amount was not based on Chief Warrant Officer C's 2010 tax return or even estimated 2011 income projected from earnings information provided in Chief Warrant Officer C's recent paystubs. Instead, the Division modified Chief Warrant Officer C's ongoing monthly child support based on its estimate of his 2011 income extrapolated from information reported to the Department of Labor.⁹

Chief Warrant Officer C requested a formal hearing. In that request, Chief Warrant Officer C complained that the Division had used too much income when his modified child support was calculated to be \$797 per month.¹⁰

At the hearing, Chief Warrant Officer C explained his employment history. Chief Warrant Officer C's earning have increased since 2004 because of a promotion, but his income recently decreased due to a change in duty stations. Chief Warrant Officer C is also no longer receiving the combat pay he received during his deployment combat pay. Chief Warrant Officer C explained that he has four children in his home ranging from 14 to 8 years old and his wife stays home to care for them. One of these children is his biological child and another he has adopted. The other two children living in his home receive child support receive some child support from their fathers. Chief Warrant Officer C explained that his household finances are

⁷ Exhibit 5.

⁸ Exhibit 4, 5 & 6.

⁹ Exhibit 6. The Division admitted that this was not the most accurate way to estimate the income of a member of the military.

¹⁰ Exhibit 7.

under considerable stress.¹¹ Chief Warrant Officer C argued that even \$607 would be too much for his monthly support obligation because if he paid that much for each of his four children he would not be able to afford it.¹²

Ms. S explained that she is paying \$500 per month just for daycare for A. Ms. S testified she is going to school and is pregnant and is adopting her stepchild child. Ms. S's husband has to help cover many of A's expenses. At the hearing, Ms. S argued that Chief Warrant Officer C's ongoing child support should be modified upward because he had received a promotion since his support was last set, and she did not think he was paying his fair share of the cost of raising A.¹³

After the hearing, the Division filed new calculations based on income information provided by Chief Warrant Officer C. The Division made 2010 and 2011 calculations that included and did not include combat pay and did and did not include an older child credit for the adopted child D. The Division argued that the calculation that the 2010 income calculation that includes combat pay and did not give an older child credit for the adopted child D should be used. This calculation resulted in a monthly ongoing child support obligation of \$923. The 2011 income calculation that does not include combat pay, but not did give an older child credit for the adopted child D resulted in monthly ongoing child support of \$848 per month.¹⁴

Based on the evidence in the record, I find that it is more likely than not the Division's new calculations and the income amounts used in those calculations are correct.¹⁵

III. Discussion

In a child support hearing, the person who filed the appeal, in this case, Chief Warrant Officer C, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁶ Chief Warrant Officer C met his burden of proof to show that the ongoing monthly amount in Division's order was incorrect. Chief Warrant Officer C's current earnings are a better estimate of his present income and earning capacity than the extrapolated 2011 earnings that the Division first used because Chief Warrant Officer C's earnings are more likely to reflect his income in the future than his income in 2010, which included combat pay that he is no longer

¹¹ Recording of Hearing – Testimony of Chief Warrant Officer C.

¹² Recording of Hearing – Testimony of Chief Warrant Officer C.

¹³ Recording of Hearing – Testimony of Ms. S.

¹⁴ Exhibits 8-12.

¹⁵ Recording of Hearing & Exhibits 8-12.

¹⁶ Alaska Regulation 15 AAC 05.030(h).

eligible for and was based on living expenses at a different duty station. In setting modified ongoing child support, it is important to recognize the forward looking nature of a modification action. The focus in setting ongoing child support in a modification action is on the obligor's ability to pay and the children's needs in the months following the effective date of the modification rather than on redressing past inequities between the interested parties. Child support should be set based on the obligor's ability to pay during the period when that support will be paid.¹⁵

Alaska law does not give a deduction from income for the purposes of calculation child support for supporting a child of a subsequent relationship if that child was born or adopted after the child of the order. Chief Warrant Officer C not should be allowed a deduction for his support for A from his support obligation for his older adopted child because that child was adopted after the birth of A.¹⁶

Ongoing child support should be calculated based using the best estimate of Chief Warrant Officer C's future income unless there is a showing by clear and convincing evidence that a variance of the calculated amount based on the child support guidelines is need to prevent an injustice.¹⁷ The new amounts calculated by the Division are correct. There is not clear and convincing evidence in the record showing that an injustice will occur if ongoing child support is set at \$848 per month.

Alaska Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.¹⁸ The rule states that a material change of circumstances "will be presumed" if the modified support amount would alter the outstanding support order by 15 percent.¹⁹

The evidence in the record shows that a material change of circumstances has occurred since Chief Warrant Officer C's ongoing child support was set at \$599 per month. The modified ongoing amount calculated at \$848 per month is more than a 15 percent change from the outstanding order of \$599 per month. A material change of circumstances justifying an upward

¹⁷ Alaska Civil Rule 90.3, Commentary III.E.

¹⁸ Alaska Civil Rule 90.3, Commentary VI.B2.

¹⁹ See Alaska Civil Rule 90.3(c) for the standards to establish good cause to vary the presumptive child support amount.

²⁰ Alaska Civil Rule 90.3(h)(1).

²¹ Alaska Civil Rule 90.3, Commentary X.

modification of ongoing child support has occurred.

Generally, a new monthly child support amount in a modification action should be effective the month after the parties are served with the petition. Following this general rule, the modification would be effective December 1, 2010, because the petition was issued in November of 2011.

The effective date of a modification cannot predate the service of the petition for modification even when it would clearly prevent an injustice.²⁰ The effective date of a modification can, however, be moved forward upon a mere showing that there is good cause to do so.²¹ Moving the effective date of a modification forward from the first of the month following the service of the petition for modification is not a variance of the child support guidelines, requiring clear and convincing evidence that moving the date forward is needed to prevent an injustice under Civil Rule 90.3(c).

There is good cause to move the effective date forward to the month after Chief Warrant Officer C's return from active duty in the war zone. The Division is technically correct that the Servicemember's Civil Relief Act does not require that a child support modification that is subject to adjustment be stayed, and only requires that a hearing on that modification be stayed. However, Chief Warrant Officer C would not have had a real opportunity help his household make adjustments to his tight household finances to accommodate an increase in his ongoing child support for A while he was deployed in Iraq.

IV. Conclusion

Chief Warrant Officer C's ongoing child support should be increased due to the increase in his earnings that has occurred since the ongoing monthly support amount was set in 2004. The effective date of the modification should be moved forward for good cause.

V. Child Support Order

The Division's Modified Administrative Child Support and Medical Support Order issued on June 9, 2011, is amended as follows, all other provisions remain in effect:

1. Chief Warrant Officer C modified ongoing child support is \$848 per month effective July 1, 2011.

²² See *State, Dept. of Revenue, Child Support Enforcement Div. v. Schofield*, 993 P2d 405, (Alaska 1999).

²³ *Alaska Dept. of Revenue, CSED v. Kevin Lyn Dillon* 977 P 2d 118, (Alaska 1999).

2. The Division will give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for A.

DATED this 13th day of October 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 1st day of November, 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.]