

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

IN THE MATTER OF:)
)
 T A. H, JR.) OAH No. 11-0379-CSS
) CSSD No. 001144149
_____)

DECISION AND ORDER

I. Introduction

The obligor, T A. H, Jr., appeals a Modified Administrative Child Support and Medical Support Order that CSSD issued in his case on August 23, 2011. The obligee child is C, age 5. The custodian is J C. S.

The formal hearing was held on October 17, 2011. Mr. H appeared by telephone; Ms. S could not be reached and did not participate. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. H' child support is modified to \$197 per month for one child, effective July 1, 2011.

II. Facts

A. History

Mr. H' child support obligation for C was set at \$50 per month in May 2007.¹ Ms. S filed a petition for modification on June 13, 2011.² On June 23, 2011, CSSD issued a Notice of Petition for Modification of Administrative Support Order to the parties.³ Mr. H did not provide income information.⁴ On August 23, 2011, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. H' child support to \$474 per month for one child, effective July 1, 2011.⁵ He appealed on September 28, 2011.⁶ After the hearing, CSSD obtained Mr. H' earnings history from the Alaska Department of Labor and Workforce

1 Exh. 1.
2 Exh. 2.
3 Exh. 3.
4 Pre-Hearing Brief at pg. 1.
5 Exh. 5.
6 Exh. 6.

Development.⁷ CSSD used the information to file a revised calculation asserting Mr. H' child support should be modified to \$638 per month, based on annual income extrapolated from his second quarter 2011 earnings.⁸

B. Material Facts

Mr. H was incarcerated from 2005 through 2009.⁹ When he was released he was successful in obtaining employment, but he was incarcerated again in 2010 and subsequently released in April 2011.

After his 2011 release, a friend helped Mr. H find a temporary, part-time job for no name, where he worked from May 9 through July 6. He is currently unemployed and searching for work with construction companies, as that is where he obtained the bulk of his experience. H lives with his grandmother, who is supporting him at this time.

Mr. H earned \$11,535 working for no name for the eight-week period from May 9 through June 30;¹⁰ plus, he would have received approximately \$1,442 for the last week of his employment with the company.¹¹ These two figures total \$12,977, which is Mr. H' estimated total income in 2011 through the date of the hearing. Mr. H stated he did not qualify for unemployment benefits. Nor does it appear that he is entitled to a PFD for 2011 or 2012.¹² Thus, unless Mr. H obtains other employment before the end of the year, his total income for 2011 would be approximately \$12,977. This figure yields a child support amount of \$197 per month.¹³

III. Discussion

As the person who filed the appeal, Mr. H has the burden of proving by a preponderance of the evidence that the modification CSSD issued is incorrect.¹⁴ A modification is effective the next month after the parties are served with notice that a modification has been requested, so this

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Exh. 7.

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Exh. 8.

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The material facts are taken from Mr. H' testimony or, where indicated, the documentary record.

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Exh. 4 at pg. 1; Exh. 7 at pg. 1.

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$\$11,535 \div 8 \text{ weeks} = \$1,442 \text{ per week.}$

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See AS 43.23.005(d).

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Attachment A.

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15 AAC 05.030(h).

modification is effective as of July 1, 2011.¹⁵ Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹⁶ 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.

For the modification review, CSSD calculated Mr. H’ modified child support at \$474 per month. This figure is based on annual income of \$32,400, which CSSD extrapolated from the earnings Mr. H received during the second quarter of 2011.¹⁷ Because he was incarcerated until April 2, 2011, those second quarter earnings constituted the only income reported for Mr. H so far this year.

Mr. H asserts his income was incorrectly calculated for a child support modification because he is unemployed and cannot find consistent employment. CSSD claims that Mr. H is voluntarily and unreasonably unemployed and that his child support should be modified to \$638 per month, as reflected in the revised calculation submitted prior to the hearing.

If a parent is found to be voluntarily and unreasonably unemployed, his or her child support amount may be calculated from that parent’s “potential income,” which should be based on his or her “work history, qualifications and job opportunities.”¹⁸ In its revised calculation, CSSD proposed that Mr. H’ annual “potential income” is \$46,100, which is his second quarter 2011 income multiplied by four quarters to arrive at an annual figure. CSSD argued at the hearing that Mr. H has earned “considerable” income while being on a release status from prison, so commensurate amounts should be attributed to him for the support calculation.

In cases in which CSSD claims a party is voluntarily and unreasonably unemployed, the court or administrative law judge must apply a two-step analysis to make such a determination. The first step is to determine whether the parent’s unemployment is actually voluntary. In case law, the Alaska Supreme Court has suggested this initial part of the inquiry should be whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed.”¹⁹ An integral part of the analysis is whether the parent’s lack of employment is a

¹⁵ 15 AAC 125.321(d). In this case, the notice was issued on June 23, 2011. Exh. 3.

¹⁶ AS 25.27.190(e).

¹⁷ Exh. 5 at pg. 8; Exh. 7 at pg. 1.

¹⁸ Civil Rule 90.3(a)(4).

¹⁹ Bendixen v. Bendixen, 962 P.2d 170, 172 (Alaska 1998).

result of “economic factors,” as in being laid off, or of “purely personal choices.”²⁰ If the question whether the unemployment is voluntary is answered in the affirmative, the second part of the inquiry is to determine whether the parent’s unemployment or underemployment is unreasonable. It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.²¹

The Alaska Supreme Court further explained the essence of the analysis in the case of *Beaudoin v. Beaudoin*²² by stating that “the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.” An obligor 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.²³ Tribunals adjudicating child support are directed to “consider the totality of the circumstances in deciding whether to impute income.”²⁴

Based on the totality of the circumstances presented in this appeal, Mr. H met his burden of proving by a preponderance of the evidence that CSSD’s Modified Administrative Child Support and Medical Support Order was incorrect. The evidence is insufficient to find that he is voluntarily and unreasonably unemployed.

Mr. H has spent most of the last five years in prison. It is evident that this fact could severely lessen his desirability as a potential employee and functionally impede his ability to secure permanent, full-time employment. Mr. H testified that he has been job hunting, so his unemployment is not voluntary to that extent. Granted, the employers he has applied with generally appear to be ones who would pay a more generous starting wage. The construction industry, after all, is where he has most of his work experience. It may be that Mr. H has not fully explored applying to other employers who pay a lower wage. But the longer he remains unemployed, the sooner Mr. H will need to broaden his efforts to include just about any employer who would be willing to hire him. At some point, he will simply need to go to work anywhere in order to support his child. The longer he remains out of the work force the closer he gets to actually being considered voluntarily and unreasonably unemployed. Alaska law is clear

²⁰ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²¹ *Kowalski*, 806 P.2d at 1371.

²² 24 P.3d 523 (Alaska 2001).

²³ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²⁴ Civil Rule 90.3, Commentary III.C.

that a parent's duty to support his or her children takes priority over other debts, obligations and lifestyle decisions.²⁵ Mr. H has some freedom in trying to find the right job, but not so much that he remains unemployed indefinitely.

Thus, Mr. H' unemployment has not been so long that it is more likely than not voluntary. Because he is not voluntarily unemployed, the question whether his unemployment is unreasonable need not be addressed. As a result, income may not be imputed to him; rather, the best estimate of his actual 2011 income should be used in the child support calculation. As discussed in the facts section, Mr. H' total income for 2011 is estimated at approximately \$12,977. This figure yields a child support amount of \$197 per month.²⁶

IV. Conclusion

Mr. H met his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect, as required by 15 AAC 05.030(h). Mr. H' child support is now correctly calculated at \$197 per month and this figure should be adopted, effective July 1, 2011.

V. Child Support Order

- Mr. H is liable for modified child support for C in the amount of \$197 per month, effective July 1, 2011;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated August 23, 2011, remain in full force and effect.

DATED this 23rd day of November, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

²⁵ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

²⁶ Attachment A.

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 12th day of December, 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.]