

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

IN THE MATTER OF:)
)
J W. S) OAH No. 11-0437-CSS
) CSSD Case No. 001155744
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of J W. S for the support of his son, T D. The custodian of record is K J. D.

On March 31, 2009, the Child Support Services Division issued a child support order for ongoing support in the amount of \$376 per month.¹ On July 27, 2011, Ms. D requested modification of the order.² On October 3, 2011, the division issued a modified administrative child support order for ongoing support in the amount of \$843 per month, effective September 1, 2011.³ Mr. S filed an appeal and requested an administrative hearing.

The Office of Administrative Hearings conducted a telephonic hearing on December 1, 2011. Both Mr. S and Ms. D participated and provided testimony. Erinn Brian represented the division.

By the time of the hearing, Mr. S had been laid off from the job he had at the time the division issued the modified support order. In order to ensure that he is able to meet his ongoing support obligation out of current income, the effective date of the modified order is moved forward to April 1, 2012. The monthly amount is adjusted to \$846 to reflect current income information and a deduction for retirement contributions not previously incorporated into the calculation of his support obligation.

II. Facts

J S lives in No Name, a small community, population 1,201, located on an island about 55 air miles from No Name in Southeast Alaska.⁴ The unemployment rate in the

¹ Exhibit 1.

² Exhibit 2.

³ Exhibit 4.

⁴ The administrative law judge takes official notice of information regarding the community characteristics of No Name as set forth in databases maintained by the Department of Labor and Workforce Development, available online at live.laborstats.alaska.gov. See 15 AAC 125.050(a) (“the agency will use

area is 13.6%. Mr. S is 31; he has a commercial driver's license and has worked as truck driver and as a heavy equipment operator on road construction projects.

In 2008, Mr. S worked for No Name Transfer, Inc., No Name, and the No Name Transportation Department, earning total wages of \$22,506.⁵ He received unemployment insurance benefits totaling \$816.⁶ With his Alaska Permanent Fund dividend (\$2,069), his total income in 2008 was \$25,391. In 2009, working for the same three employers and for a short period for a fourth, Southeast -, Inc., Mr. S earned total wages of \$44,257 and did not receive any unemployment insurance benefits.⁷ His total income, including his Alaska Permanent Fund dividend (\$1,305), was \$45,562. In 2010, Mr. S worked most of the year for Southeast No Name, earning total wages of \$71,725.⁸ He was briefly unemployed and received unemployment compensation benefits of \$1,212.⁹ His total income in 2010, including his Alaska Permanent Fund dividend (\$1,281), was \$74,212.

In 2011, Mr. S was unemployed during much of the first quarter of the year, receiving \$1,930 in unemployment insurance benefits.¹⁰ He returned to work for Southeast No Name in March, and worked for that firm through the year until he was laid off in November. His total wages in 2011 were \$66,579, more than half of which was earned in a single quarter.¹¹ His base hourly wage was \$25 or \$36, and his overtime wage was \$37 or \$55 per hour.¹² His total income in 2011, including his Alaska Permanent Fund dividend (\$1,174), was \$69,683. In 2011, his employer withheld approximately 5.8% of his gross wages as a mandatory contribution towards a retirement plan.¹³

the best information available, including any information available to it through automated sources such as information maintained by the Department of Labor and Workforce Development"). A party objecting to taking official notice of this information may do so in a proposal for action. See 2 AAC 64.300.

⁵ Exhibit 6, p. 1.

⁶ Exhibit 6, p. 2.

⁷ Exhibit 6.

⁸ Exhibit 6, p. 1. Mr. S apparently worked a day or two for Arrowhead Transfer, earning wages of \$180 (included in his total wages of \$71,725).

⁹ Exhibit 6, p. 2.

¹⁰ Exhibit 6, p. 2.

¹¹ Mr. S's total wages are shown on his November 25 paystub. He earned wages of \$34,868 in the third quarter alone. Exhibit 6, p. 1.

¹² These amounts are shown on the paystubs submitted into the record by Mr. S.

¹³ Mr. S testified that all of the non-tax-related deductions from his income (\$7,990.86) were for child support and mandatory contributions to a retirement plan out of No Name wages. His child support

Mr. S's job with Southeast No Name is seasonal, and he was laid off for the winter in November, 2011. He anticipates being rehired by Southeast No Name in the spring, but his income after that will depend on the projects the firm obtains. Pending his re-employment in the spring, Mr. S will look for work on the North Slope and rely on unemployment insurance benefits as his means of support. Mr. S can reasonably anticipate total wages in 2012 equivalent to his 2011 wages (\$66,579) and unemployment insurance benefits equivalent to his 2011 benefits (\$1,930). His reasonably anticipated total income in 2012, including an Alaska Permanent Fund dividend (\$1,174) is \$69,683, or \$5,807 per month.

Mr. S is married. He and his wife have two children, including an infant. His wife recently returned to work, earning about \$11.50 an hour for part time work (25 hours a week) as a teller. The reasonably anticipated household income in 2012, including Mr. S's reasonably anticipated total income (\$69,683) and his wife's wages (\$14,375) and Alaska Permanent Fund dividend, will be approximately \$85,232. Mr. S's average monthly take-home income, exclusive of child support, can reasonably be expected to be in the neighborhood of \$3,800,¹⁴ and his wife's around \$1,072,¹⁵ for total monthly available income of \$4,872. The monthly reasonably necessary household living expenses will total approximately \$4,354, including rent (\$1,500),¹⁶ groceries (\$900),¹⁷ utilities (\$347.73),¹⁸ propane and oil (\$278),¹⁹ telephone (\$104),²⁰ vehicles (\$724),²¹ child care (\$300),²² and personal care (\$200, including clothes and diapers).²³

deductions through November, assuming monthly deductions of \$376, totaled \$4,136, leaving \$3,854.86 as his total mandatory retirement contribution in 2011 (\$312.07 per month for 12 months).

¹⁴ Mr. S's net take-home pay in 2011 was \$41,090.75. He testified that his only non-tax deductions were for child support and involuntary contributions to a retirement program. Assuming the amount withheld from his pay for child support was \$376 per month for a full year, the total amount withheld would be \$4,512. Thus, his net take-home pay, exclusive of child support, can reasonably be expected to be about $\$41,090.75 + \$4,512 = \$45,602.75$, or about \$3,800 per month.

¹⁵ The monthly take home pay is estimated based on the standard deductions for income tax, social security, and unemployment insurance for a parent earning \$14,375 per year, as shown on the division's child support calculator.

¹⁶ Testimony of J. S.

¹⁷ Mr. S testified that the household spends \$400-\$500 per week for food, or approximately \$1,720-\$2,150 per month. However, Ms. D testified that her household (consisting of two adults and three children) spends only \$800-\$1,000 per month on food. Mr. S's estimate seems excessive by comparison.

¹⁸ Mr. S testified that his most recent monthly utility bills were \$95.73 for water, sewer and garbage, and \$252 for electricity.

¹⁹ Mr. S testified that his most recent bill for propane was \$316.28 for two months, and that he uses about 60 gallons of heating fuel oil costing about \$4 per gallon every two months. Thus, his total monthly cost is approximately $\$316.28 + \$240 = \$556.28, \div 2 = \278.14 .

K D also lives in No Name, in a house she shares with her partner and their three children, ages 10, 5 and 4, in addition to T. Ms. D works part-time (20 hours per week) for a wage of \$15.69 per hour at the No Name medical clinic, earning about \$1,349 per month. Her partner works full time (40 hours per week) and earns \$23.50 per hour, or about \$4,042 per month. She receives child care assistance that covers the cost of providing child care when she is at work. Ms. D contributes about \$400 per month to the household expenses for food and pays about \$344 per month for gasoline for her truck, a fully paid for 2003 GMC Yukon; her partner pays all of the other household expenses.

III. Discussion

For one child, a parent's presumptive support obligation is 20% of that parent's adjusted annual income,²⁴ that is, total income after allowable deductions.²⁵ When the child support obligation changes by an amount greater than 15% of the existing order, a material change of circumstances is presumed and the existing order may be modified.²⁶

In this case, the division initially calculated Mr. S's support obligation based on anticipated 2011 income of \$64,065, projecting his anticipated future income based on his income from his last four quarters of work, all of which were spent working for Southeast No Name except for a few days.²⁷ In fact, Mr. S's total income in 2011 was somewhat greater than the division projected, even though he was laid off before the end of the year: his actual 2011 income was \$69,683. His support obligation for 2011, based on his actual income, is \$846 per month, as shown on Appendix A, attached. A deduction for Mr. S's contribution to a retirement plan has been provided in accordance with his testimony that the non-tax-related deductions from his income reflect child

²⁰ Mr. S testified that he pays \$18 per month for a telephone land line and \$86 per month for his cell phone, and that his wife pays an additional amount for her cell phone.

²¹ Mr. S testified that he owns 2000 Chevrolet Silverado that is fully paid for (which is his work truck) and a 2007 Chevy Silverado on which he pays \$293 per month. The other monthly vehicle expenses include insurance (\$150), gasoline (\$60 per week, or \$258 per month), and maintenance (\$23).

²² Mr. S testified that he pays \$200 per month when he is working for child care for one child and that adding one child will cost at least an additional \$200 per month. Assuming he works nine months in 2012, his total child care expense will be \$3,600, or \$300 per month.

²³ Mr. S testified that diapers cost \$28 per week, or \$120 per month. An additional \$80 per month has been added to account for other clothing expenses for a household of four.

²⁴ 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

²⁵ 15 AAC 125.070(a); -.065; Civil Rule 90.3(a)(1).

²⁶ Civil Rule 90.3(h)(1).

²⁷ See Exhibit 4, p. 8; Exhibit 6, p.1; note 8, *supra*.

support and mandatory retirement contributions.²⁸ Because the contribution was involuntary, the amount contributed is entirely deductible for purposes of calculating his child support obligation.²⁹

Since November, 2011, Mr. S has been seasonally unemployed, as he was in the winter of 2010-2011. However, he anticipates returning to work for Southeast No Name, and unless the firm has a reduction in available work he anticipates substantially equivalent earnings in 2012. Accordingly, his presumptive 2012 support obligation is the same as in 2011.

The presumptive support obligation may be reduced if the amount as calculated under 15 AAC 125.070 would result in a manifest injustice due to unusual circumstances.³⁰ The obligor must provide clear and convincing evidence of manifest injustice.³¹ In determining whether manifest injustice exists, all of the relevant circumstances should be considered.³²

Mr. S's appeal contested the imposition of a support obligation of \$843 per month. At the time of the hearing, because he was unemployed, payment of that amount would have been impossible (Mr. S testified that he had no savings). However, in light of his prior earnings and his expectation that he will return to employment early in 2012, it is not manifestly unjust to impose a support obligation based on his anticipated income in 2012. Mr. S's anticipated monthly household exceeds his anticipated monthly household living expenses by approximately \$500 per month. While this is less than his monthly support obligation of \$846, the gap is not so great as to suggest it cannot be bridged. Moreover, Mr. S testified that he had previously had no trouble making a monthly payment of \$376, and his wife at that time was unemployed. With her entry into the work force, the additional income she provides would presumably allow Mr. S to make a greater contribution to T's support. For these reasons, Mr. S has not shown that the presumptive support obligation is manifestly unjust.

²⁸ See note 13, *supra*.

²⁹ 15 AAC 125.065(a); Civil Rule 90.3(a)(1)(A)(v). The amount deducted was approximately 5.8% of Mr. S's gross wages. Thus, it would have been entirely deductible for purposes of calculating child support even if the contribution had been voluntary. Civil Rule 90.3(a)(1)(B).

³⁰ 15 AAC 125.075(a)(2).

³¹ 15 AAC 125.075(a); *see* Civil Rule 90.3(c)(1).

³² *See* 15 AAC 125.080.

Generally, a modification is effective on the first day of the month after service of the petition for modification.³³ However, the effective date may be advanced upon a showing of good cause.³⁴ In this case, there is good cause to move the effective date forward. First, Mr. S was laid off from his job due to lack of work in November, shortly after the division issued the modification order. Because the effective date of the modification was September 1, Mr. S was immediately in arrears and in the absence of paid employment was temporarily unable to meet his support obligation. Given his tight family budget, he will have limited ability to catch up after an initial arrears resulting from the increase in his support obligation, even after he returns to work.³⁵ Second, the modified order is a 225% increase from Mr. S's prior support order and in light of his current other obligations Mr. S will need to make financial adjustments to meet his newly-ordered support obligation.³⁶ Third, Mr. S's ability to earn an income justifying the increased support obligation is entirely dependent on his firm's success in maintaining the high level of business activity that it has experienced in the past two years. Historically, Mr. S's earnings were much less than in the past two years. Until the new construction season begins, the prediction of Mr. S's 2012 income is necessarily somewhat speculative. A delayed effective date will ensure that undue arrears do not accrue before his income situation is more certain.

IV. Conclusion

The presumptive support obligation has changed by 15% or more, and its not manifestly unjust. The support order should be modified to reflect Mr. S's actual and anticipated income in 2011-2012, with a delayed effective date to accommodate his unemployment beginning November, 2011, which is anticipated to end in March, 2012.

³³ 15 AAC 125.321(d).

³⁴ State, Child Support Enforcement Division v. Dillon, 977 P.2d 118 (Alaska 1999); Boone v. Boone, 960 P.2d 1579 (Alaska 1998).

³⁵ See In Re J.L.E., at 3, OAH No. 08-0607-CSS (Commissioner of Revenue 2009) (modified order issued in October, effective prior May, obligor unemployed one month or more; effective date set to November); In Re J.R.H., at 3-4, OAH No. 08-0422-CSS (Commissioner of Revenue 2008) (modified order issued in July, effective prior May, obligor unemployed in January, anticipates return to work in October; effective date set to October); In Re R.G.O., at 1-2, OAH No. 08-0122-CSS (Commissioner of Revenue 2008) (modified order issued in January, effective prior November, obligor unemployed from February through mid-April; effective date set to May).

³⁶ See In Re T.T.T., at 4, OAH No. 09-0081-CSS (Commissioner of Revenue 2009) (no period of unemployment, but good cause to delay effective date in light of substantial shortfall in currently available income, in order to allow time to adjust household finances); In Re J.A.H., at 2, OAH No. 07-0680-CSS (Commissioner of Revenue 2008) (400% increase, effective date delayed).

CHILD SUPPORT ORDER

The Modified Administrative Child Support and Medical Support Order dated October 3, 2011, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated October 3, 2011, is **AFFIRMED**:

Modified ongoing child support is set at \$846 per month, effective April 1, 2012.

DATED: January 6, 2012.

Signed _____
Andrew M. Hemenway
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 30th day of January, 2012.

By: *Signed* _____
Signature
Andrew M. Hemenway _____
Name
Administrative Law Judge _____
Title

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