

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

IN THE MATTER OF:)

E L. C)

OAH No. 12-0128-CSS

CSSD No. 001144294

DECISION AND ORDER

I. Introduction

The obligor, E L. C, appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on April 24, 2012. The obligee child is E, age 10. The custodian is W E. X.

The hearing was held on June 25, 2012. Both Mr. C and Ms. X participated. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after due deliberation, Mr. C's child support is modified to \$249 per month for one child, effective April 1, 2012.

II. Facts

A. Procedural Background

Mr. C's child support obligation for E was set at \$50 per month in 2007.¹ In March 2012, Ms. X requested a modification review and CSSD notified Mr. C.² He did not supply income information,³ and on April 24, 2012, CSSD issued a Modified Administrative Child Support and Medical Support Order that increased his child support to \$247 per month, effective April 1, 2012.⁴ Mr. C appealed on May 7, 2012.⁵

B. Material Facts

Mr. C was most recently employed by a local restaurant chain. He was terminated in February 2012 because he had problems arranging transportation and missed a few work shifts.⁶ He has looked for work at numerous local restaurants since then but has not been able to secure

¹ Exh. 1.

² Exhs. 2-3.

³ CSSD's Pre-Hearing Brief.

⁴ Exh. 4 at pg. 6. This figure was calculated from the minimum wage, not from Mr. C's actual income.

⁵ Exh. 6.

⁶ The material facts are taken from Mr. C's testimony, unless otherwise indicated.

employment. Before he was fired in February 2012, Mr. C received year-to-date wages of \$2,902.67 from the restaurant.⁷

The most recent evidence of Mr. C's annual income is from 2011. Last year, Mr. C earned \$12,586.57 in wages from employment and received \$3,425 in unemployment benefits (UIB).⁸ Adding the Permanent Fund dividend (PFD) of \$1,174, results in total annual income of \$17,185.57. A child support amount calculated from this income figure is \$249 per month for one child.⁹

Also in 2011, Mr. C supplemented his earnings by working under the table detailing cars for \$100 per vehicle. He tried to start a business, but it was not successful. Mr. C's approximate earnings from this endeavor in 2011 are unknown. He testified that he did not continue his detailing business into 2012, but he is capable of doing so, especially since he is not currently working.

Mr. C and his wife, K, have two children in the home, her 14-year-old boy from a prior relationship and their 2-year-old son. K works part-time as a server in a local restaurant. The family lives with K's father and they pay \$700 per month in rent. Their other regular monthly expenses include \$400 for food; \$50 for a cell phone; \$50 for bus service; \$200 for personal care items; and \$600 for cigarettes. Mr. C owes several unpaid debts – a consumer loan of \$1,300; student loans of \$18,000; traffic tickets and fines of \$3,300; and a debt to Providence Hospital of \$2,400. Mr. C cannot legally drive until he pays his traffic tickets.

III. Discussion

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹⁰ 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. Mr. C's child support has been \$50 per month since 2007. Thus, a child support calculation of \$57.50 or more would be sufficient to warrant modification in this case.¹¹

⁷ Exh. 7 at pg. 1.

⁸ Exh. 7 at pgs 1, 3.

⁹ Attachment A.

¹⁰ AS 25.27.190(e).

¹¹ \$50 x 1.15 = \$57.50.

A modification is effective beginning the first of the next month after CSSD issues a notice to the parties that a modification has been requested.¹² In this case, the notice was issued on March 7, 2012, so a modification would be effective as of April 1, 2012.¹³ In a child support matter, the person who files the appeal, in this case, Mr. C, has the burden of proving by a preponderance of the evidence that CSSD’s modification order was incorrect.¹⁴

A. *Child Support Calculation*

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,” minus mandatory deductions such as taxes and Social Security. CSSD claims that Mr. C is voluntarily and unreasonably unemployed.

In cases in which CSSD or a party claims the obligor parent is voluntarily unemployed or underemployed, the administrative law judge must determine whether the parent has engaged in voluntary conduct with “the purpose of becoming or remaining unemployed.”¹⁵ If the answer is “yes,” the parent’s child support may be calculated using imputed income instead of the parent’s actual income. An integral part of the analysis is whether the parent’s lack of employment or underemployment is a result of “economic factors,” as in being laid off, or of “purely personal choices.”¹⁶ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith.¹⁷

The Alaska Supreme Court explained the essence of the analysis in *Beaudoin v. Beaudoin*¹⁸ 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.” The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances” in deciding whether a parent is voluntarily and unreasonably unemployed.”¹⁹

Based on the “totality of the circumstances,” Mr. C is not voluntarily and unreasonably unemployed. It appears he was careless about making sure he had transportation to his job every

12 15 AAC 125.321(d).
13 Exh. 3.
14 15 AAC 05.030(h); 2 AAC 64.290(e).
15 *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).
16 *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).
17 *Kowalski*, 806 P.2d at 1371.
18 24 P.3d 523 (Alaska 2001).
19 Civil Rule 90.3, Commentary III.C.

day earlier this year, which unfortunately resulted in his termination, but the evidence is insufficient to establish that Mr. C became unemployed voluntarily. Similarly, Mr. C's current unemployment is not voluntary. He has pursued work from several employers in his profession, with no results. When an obligor cannot secure employment in his or her chosen field, the advice is usually to broaden the work search, or to look for a part-time or minimum wage job, at least to get back into the job market. That advice would not serve Mr. C very well, given that he has already been in a largely part-time job earning about the minimum wage. His only meaningful choice is to continue to look for work as best he can.

Because Mr. C is not voluntarily and unreasonably unemployed, his child support calculation should be based on his most recent actual annual income from 2011, which, including wages, UIB and the PFD, totaled \$17,185.57. A child support amount correctly calculated under Civil Rule 90.3 from this income figure is \$249 per month for one child.²⁰ This amount is only \$2 more than the figure CSSD arrived at using the minimum wage for a one-year period.²¹

Mr. C argues that his child support should stay at \$50 per month because he is currently unemployed. However, it is more likely than not that Mr. C's unemployment is a temporary circumstance that will improve when he returns to work or finds another job. The obligor may lack the ability to pay the total child support amount every month while he is unemployed, but there is no evidence that Mr. C is permanently unemployed. He may incur some additional arrears while he is unemployed, but Mr. C should be able to start paying those off once he starts working again. Alaska law generally considers unemployment to be a temporary circumstance that should not result in the reduction of an obligor parent's child support obligation.²² Prior decisions from the Office of Administrative Hearings follow this approach.²³

B. Reduction Based on Financial Hardship

Mr. C's child support is correctly calculated at \$249 per month for one child. He requested that this amount be lowered based on financial hardship.

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount

²⁰ Attachment A.

²¹ See Exh. 4 at pg. 6.

²² *Patch v. Patch*, 760 P.2d 526 (Alaska 1988).

²³ See *In The Matter Of M.J.V.*, OAH Case No. 09-0181-CSS.

calculated, but only if he or she shows that “good cause” exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that “manifest injustice would result if the support award were not varied.”²⁴ It is appropriate to consider all relevant evidence to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).²⁵

Based on all the evidence, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. C did not prove by clear and convincing evidence that manifest injustice would result if his child support were not reduced. Granted, he is currently unemployed, but as stated above, this appears to be a temporary circumstance, and Mr. C is receiving UIB at this time. Mr. C’s wife, K, is employed part-time and is able to bring in additional income to the family. Also, Mr. C and K and their children are living with her father, so their living expenses are much lower than they would be if the family was living in their own housing. Finally, it should be noted that during his testimony about his expenses, Mr. C acknowledged that both he and his wife smoke, and that they pay about \$600 per month for cigarettes. This figure is more than twice as much as the \$249 per month child support amount Mr. C said he cannot pay. Under these circumstances, Mr. C’s child support should not be varied for the reason of financial hardship.

IV. Conclusion

Mr. C did not meet his burden of proving by a preponderance of the evidence that his modified child support amount was incorrect. Neither did he prove by clear and convincing evidence that manifest injustice would result if his modified child support amount calculated under Civil Rule 90.3 were not varied. Mr. C’s child support is correctly calculated at \$249 per month pursuant to Civil Rule 90.3, without a hardship variation. This figure is a correct measure of Mr. C’s modified child support obligation, and it should be adopted, effective April 1, 2012.

V. Child Support Order

- Mr. C’s child support obligation for E is modified to \$249 per month for one child, effective April 1, 2012, and ongoing;

²⁴ Civil Rule 90.3(c).

²⁵ See Civil Rule 90.3, Commentary VI.E.1.

- All other provisions of the Modified Administrative Child Support and Medical Support Order dated April 24, 2012, remain in full force and effect.

DATED this 28th day of August, 2012.

By: Signed
Kay L. Howard
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 14th day of September, 2012.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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