

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

IN THE MATTER OF: )  
 ) OAH No. 12-0157-CSS  
D M. K ) CSSD No. 001104672  
\_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

This case involves the obligor D M. K's appeal of a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on April 11, 2012. The obligee child is S, who is 14 years old. The custodian is N A.

The hearing was held on July 23, 2012. Mr. K participated by telephone. Ms. A did not participate.<sup>1</sup> Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. K's request for a variance under Civil Rule 90.3(c) due to financial hardship is granted. His child support is modified to \$400 per month, effective March 1, 2012.

**II. Facts**

*A. Procedural Background*

Mr. K's child support for S was set at \$195.36 per month in May 2002.<sup>2</sup> Ms. A requested a modification review on February 3, 2012.<sup>3</sup> On February 10, 2012, CSSD issued a Notice of Petition for Modification of Administrative Support Order to the case parties.<sup>4</sup> Mr. K did not respond or provide financial information.<sup>5</sup> On April 11, 2012, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. K's ongoing child

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<sup>1</sup> Just before the hearing was to begin, a telephone call made to Ms. A went unanswered, so a voicemail message was left for her to call the Office of Administrative Hearings (OAH). A second call was made to her work number, but she was not there. As of the date of this decision, Ms. A has not contacted the OAH.

<sup>2</sup> Exh. 1. It is not known whether the previous amount was \$195.36 per month or \$196.36 per month. The first page of CSSD's administrative order contains both amounts, but the computer calculation worksheet indicates \$195.36. In any event, the difference is not important here. In this decision, the lower amount will be used.

<sup>3</sup> Exh. 2.

<sup>4</sup> Exh. 3.

<sup>5</sup> CSSD's Pre-Hearing Brief at pg. 1.

support to \$595 per month, effective March 1, 2012.<sup>6</sup> He provided updated income information on May 8, 2012, and later appealed, stating the modification is “unmanageable” for him and his family.<sup>7</sup> Prior to the hearing, CSSD filed a revised support calculation of \$689 per month, based on the Leave and Earnings Statements (LES) he provided.<sup>8</sup>

*B. Material Facts*<sup>9</sup>

Mr. K is in the military – he is an E-5 with 4 years of service.<sup>10</sup> He and his wife, B, 27, have two children in the home – a six-year-old son and a four-year-old daughter. B is not employed, primarily because their youngest child is still at home full-time. Mr. K works varied shifts throughout the month, so he would not be able to provide child care consistently from week to week. Another reason B is not working is because she was only 18 when she and Mr. K met and she has been employed at only one job. As a result of her minimal work experience, Mr. K claims B would have a very difficult time finding employment in the current economy.

Mr. K has monthly bills, other than for housing, of approximately \$600 for food; \$39.98 for Internet service; \$71.80 for cable; \$188.78 for cell phones; \$361.48 for a vehicle payment; \$300 for gasoline; \$15 for vehicle maintenance; \$67.38 for vehicle insurance;<sup>11</sup> \$50 for entertainment; \$20 for personal care items; \$42 for clothing;<sup>12</sup> and \$65 for the payments on two credit cards with a total balance of \$3,900. These bills total about \$1,821.42.<sup>13</sup>

Mr. K’s base pay and entitlements, including BAH (Basic Allowance for Housing) and BAS (Basic Allowance for Subsistence), total \$3,846.04 per month.<sup>14</sup> His mandatory deductions, including taxes, Social Security, Medicare and rent, total \$1,821.42.<sup>15</sup> The remainder is \$1,979.34 to pay his bills of \$1,821.42, which leaves a balance of \$157.92.<sup>16</sup> Ms. A did not appear for the hearing, so essentially nothing is known of the financial circumstances of her and S.

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<sup>6</sup> Exh. 4.

<sup>7</sup> Exhs. 5-6.

<sup>8</sup> Exh. 8.

<sup>9</sup> The material facts are taken from Mr. K’s hearing testimony, or as otherwise cited.

<sup>10</sup> Exh. 5 at pg. 5.

<sup>11</sup>  $\$808.54 \text{ annually} \div 12 = \$67.38.$

<sup>12</sup>  $\$500 \text{ annually} \div 12 = \$42.$

<sup>13</sup> Exh. 9.

<sup>14</sup> Exh. 5 at pg. 5.

<sup>15</sup> Exh. 5 at pg. 5.

<sup>16</sup>  $\$1,979.34 - \$1,821.42 = \$157.92.$

### III. Discussion

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”<sup>17</sup> 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. K’s child support was previously \$195.36 per month, so a calculation of \$225 or higher would be sufficient to modify his child support obligation.<sup>18</sup>

A modification is effective beginning the first of the month after the parties are served with notice of the modification request, so any modification of Mr. K’s support obligation is effective as of March 1, 2012.<sup>19</sup>

The person who filed the appeal, in this case, Mr. K, has the burden of proving by a preponderance of the evidence that the agency’s calculations are incorrect.<sup>20</sup>

#### A. *Child Support Calculation*

Mr. K’s child support was set at \$195.36 per month for one child in 2002. In response to this petition for modification review, CSSD modified his child support to \$595 per month, but prior to the hearing revised that figure to \$689 per month, based on his latest paystub.<sup>21</sup> Mr. K does not dispute this figure, but on a policy level, he does not believe the BAH amount should be included in his income for the support calculation because his family lives in housing provided by the military. He asserts that the BAH should not be used because it is not a cash benefit that he receives and it is not reflected on his W-2.

Civil Rule 90.3(a)(1) provides that an obligor’s child support amount is to be calculated from his or her “total income from all sources,” minus mandatory deductions. The rule states specifically that a military parent’s total income from all sources includes “Armed Service Members base pay plus the obligor’s allowances for quarters, rations, COLA and specialty pay.”<sup>22</sup> The reason for including the non-pay benefits such as the BAH in the child support calculation is because they reduce the parent’s living expenses and allow the soldier to use the

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<sup>17</sup> AS 25.27.190(e).

<sup>18</sup>  $\$195.36 \times 1.15 = \$224.66$  (rounded up to \$225).

<sup>19</sup> 15 AAC 125.321(d). In this case, the notice was issued on February 10, 2012. Exh. 3.

<sup>20</sup> 15 AAC 05.030(h).

<sup>21</sup> Exh. 8.

<sup>22</sup> Civil Rule 90.3, Commentary III.A.29.

remainder of his or her cash pay to cover other expenses. If the military parent lives off base, the BAH figure used is the actual monetary allowance reflected on the Leave and Earnings Statement (LES). If the soldier lives on base or in housing provided by the military, Civil Rule 90.3 directs CSSD to treat the housing benefit as an in-kind contribution, and its value, for child support purposes, is the same amount the soldier would receive for BAH while living off base and paying rent.<sup>23</sup> CSSD does not have the discretion to leave this in-kind benefit out of the soldier's child support calculation. Civil Rule 90.3 requires that it be included in the parent's income.

CSSD's revised calculation yields a child support amount of \$689 per month.<sup>24</sup> This figure is correct because it was based on Mr. K's actual income as reflected in his LES and calculated pursuant to Civil Rule 90.3. This figure exceeds a 15% difference from the prior support amount of \$196.36 per month, so a modification of his child support is allowed. It is from this calculation that Mr. K's request for a variance based on financial hardship should be considered.

*B. Financial Hardship*

The primary issue in this appeal is whether Mr. K is entitled to a reduction in his child support obligation based on a financial hardship, pursuant to Civil Rule 90.3(c). His modified child support is now correctly calculated at \$689 per month.

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 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."<sup>25</sup> It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child, 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).<sup>26</sup>

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<sup>23</sup> Civil Rule 90.3, Commentary III.A.19.

<sup>24</sup> Exh. 8 at pg. 1.

<sup>25</sup> Civil Rule 90.3(c).

<sup>26</sup> See Civil Rule 90.3, Commentary VI.E.1.

As can be seen from an examination of his April 2012 LES<sup>27</sup> and list of expenses,<sup>28</sup> Mr. K's financial situation is pretty dire at this point. Mr. K receives \$1,979.34 after his mandatory deductions and allotments. With \$595 being garnished from this amount before he receives his check, Mr. K has only \$1,384 remaining with which to pay his household bills totaling \$1,821, a shortfall of \$437 every month.<sup>29</sup> Since the revised support amount of \$689 per month is correct, Mr. K's shortfall is actually about \$531 per month. Obviously, Mr. K would be in a much better position – and he would be able to squeak by financially – if he were able to scrape together another \$500 per month. One option is to have B work part-time; she could even take in some other children for babysitting. Mr. K's schedule would not allow him to watch the children the entire time if she were working out of the home, but some work-from-home job might be possible in this case.

In the meantime, however, Mr. K is not able to meet all of his obligations and he continues to fall further behind every month. At some point his career could be in jeopardy, given the military's usual requirement that soldiers support their families.

Little is known of Ms. A's situation at this point. She did not appear or submit any evidence in Mr. K's appeal.

Based on all the evidence presented, Mr. K proved by clear and convincing evidence that manifest injustice would result if he were required to pay the revised modified child support amount of \$689 per month. In applying the legal standard to Mr. K's case, a primary factor to be taken into consideration is that after paying support, the obligor will have a shortfall of over \$500 with which to pay his necessary expenses, including food and other necessities. Thus, Mr. K should be granted some relief under Civil Rule 90.3(c). Still, his child support should be increased somewhat, given the fact that his income has increased since his last child support calculation. Under these circumstances, Mr. K's modified child support should be set at \$400 per month. This amount effectively splits the difference between his prior support amount and CSSD's revised calculation of \$689 per month. It will relieve some, not all, of the financial burden on Mr. K, yet it will also provide Ms. A with at least a modest increase in financial support for S.

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<sup>27</sup> Exh. 5 at pg. 5.

<sup>28</sup> Exh. 9.

<sup>29</sup> \$1,979.34 minus \$595 = \$1,384. \$1,384 minus \$1,821 = (\$437).

**IV. Conclusion**

Mr. K met his burden of proving by clear and convincing evidence that manifest injustice would result if his child support obligation were not varied from the amount calculated by CSSD. Mr. K's child support is correctly calculated at \$689 per month under Civil Rule 90.3(a), but a child support amount of \$400 per month, determined pursuant to Civil Rule 90.3(c), represents a balance of the totality of the circumstances in this case and should be adopted based on his financial hardship.

**V. Child Support Order**

- Mr. K is liable for modified ongoing child support for S in the amount of \$400 per month, effective March 1, 2012, and ongoing;
- All other provisions of CSSD's Modified Administrative Child Support and Medical Support Order dated April 11, 2012, remain in full force and effect.

DATED this 19<sup>th</sup> day of September, 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 9<sup>th</sup> day of October, 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.]