

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

In The Matter of:)
)
 N E D) OAH No. 13-0550-CSS
) CSSD Case Nos. 001161909, 001173624
)
_____)

DECISION AND ORDER

I. Introduction

This case involves obligor N E D's appeal of an order denying modification of his child support obligation that was issued by the Child Support Services Division (CSSD) on March 18, 2013. Based on the evidence in the record, CSSD's Decision on Request for Modification Review dated March 18, 2013 is affirmed. Mr. D's child support obligation remains at \$244 per month, as set in January 2011.

II. Facts

A. Material Facts

The child in this case is N E D, Jr., age five.¹ The custodian of record is Foster Care Alaska.² N has been with third party custodians since January 2011 or before.³

Mr. D also has two older children named B (age 10) and K (age 15) from prior relationships.⁴ Mr. D does not have custody of these two older children and has child support obligations for them also.⁵

Mr. D lives about 4.5 miles off No Name, in a rural area of No Name, 45-50 miles from any significant town.⁶ He has lived there since 2010. For the last two years he has lived in a small motor home camper which is owned by one of his friends, and which is located on land owned by the same friend. He has no electricity or other utilities where he lives, and he hauls his own water.

Mr. D has not worked steadily for wages since 2010.⁷ For the last two years he has worked for his landlord and neighbors on a barter basis, performing labor such as vehicle maintenance and

¹ Ex. 1 p. 1. For simplicity, the son will be referred to as "N," and his father will be referred to as "Mr. D."

² Ex. 1 p. 1; CSSD case referral form.

³ Ex. 1 p. 1. Mr. D testified that his parental rights as to N were terminated in 2011 and that N was subsequently adopted.

⁴ Ex. 3 p. 1.

⁵ Ex. 3 p. 1.

⁶ Ex. 3 p. 1; N D hearing testimony (sources for entire paragraph).

⁷ Ex. 3 p. 1; Exs. A, B, C, D (sources for entire paragraph).

home and yard maintenance in exchange for things like firewood, gas, oil, dog food, food, and tobacco. He mostly relies on Food Stamps to purchase food. When he needs to shop for food he must get a ride into town from a friend.

Mr. D has one medical bill of about \$1,000 which he owes, but on which he is not currently able to make payments.⁸ He currently has no other debts or monthly payments.

Information obtained by CSSD from the Alaska Department of Labor and Workforce Development (ADOL) indicates that Mr. D received unemployment insurance benefits (UIB) of \$7,025.80 in 2009 and \$1,746.00 in 2010, and earned gross wages of \$184.50 in 2011.⁹ ADOL's records indicate that Mr. D did not receive any wages or UIB in 2012 or thus far in 2013.¹⁰

Prior to moving to his current location, Mr. D worked "on the docks" for various seafood processing companies.¹¹ This was generally seasonal work, and his wage was usually \$10.00 per hour.

Mr. D currently has no mental or physical disabilities which would prevent him from obtaining employment.¹² However, his driver's license has been suspended, which he testified currently makes it extremely difficult for him to seek and obtain employment.¹³ He testified that, if he could get his driver's license back, he could get a job and begin paying child support.

Prior to this year, Mr. D had not applied for the State of Alaska Permanent Fund Dividend (PFD) since 2010.¹⁴ However, he applied this year, and has pledged to keep applying in the future so that his PFDs can be applied to his child support obligation.

B. Procedural History

CSSD originally set Mr. D's child support for N at \$244 per month on January 11, 2011.¹⁵ This child support amount was based on annual gross income of \$18,295 and adjusted annual income of \$14,640.¹⁶ On February 19, 2013 Mr. D requested modification of the 2011 child

⁸ N D hearing testimony (source for entire paragraph).

⁹ Ex. 5.

¹⁰ Ex. 5.

¹¹ N D hearing testimony (source for entire paragraph).

¹² N D hearing testimony.

¹³ Ex. 3 p. 1; N D hearing testimony. Mr. D testified that his driver's license was suspended for failure to pay child support in September 2010. This action was apparently taken by CSSD pursuant to A.S. 25.27.246.

¹⁴ Ex. 3 p. 1; N D hearing testimony.

¹⁵ Ex. 1.

¹⁶ Ex. 1 p. 8.

support order on the grounds that he currently has no income.¹⁷ On March 18, 2013 CSSD issued an order denying Mr. D's request to modify his child support obligation.¹⁸

On April 7, 2013 Mr. D appealed CSSD's denial of his request for modification.¹⁹ On his appeal form Mr. D stated in relevant part as follows:²⁰

Where I live it is too far to hitchhike every day to work and be on time I have to live where I do because I have no driver's license and no place to live in town I would be able to get a job if I had a [driver's] license which you have taken from me Please help me lower my payments and get my [driver's] license back

On April 23, 2013 the Office of Administrative Hearings (OAH) mailed hearing notices to the parties by certified mail using their last-known addresses. The formal hearing was held on May 9, 2013. Mr. D participated in the hearing by phone. The custodian of record did not participate. Child Support Specialist Christina Vaden participated by telephone and represented CSSD. The record closed on June 6, 2013.

III. Discussion

A. Mr. D Bears the Burden of Proof in this Case

As the person who filed the appeal in this case, Mr. D has the burden of proving by a preponderance of the evidence that CSSD's denial of modification was incorrect.²¹

B. CSSD was Correct to Deny Mr. D's Request for Modification

Child support orders may be modified upon a showing of good cause and material change in circumstances.²² If a party's new financial circumstances would result in a new child support obligation at least 15% more or less than the previous support order, Civil Rule 90.3(h) assumes a material change in circumstances has been established, and the child support order may be modified. In this case, Mr. D's current child support obligation was based on annual gross income of \$18,295, whereas Mr. D's current cash income, at least on paper, is zero.²³ Thus, Mr. D appears to satisfy the test for modification under Civil Rule 90.3(h).

CSSD asserts, however, that Mr. D's current child support obligation should not be reduced, even though he currently has no cash income, on the grounds that his current unemployment or

¹⁷ Exs. 2, 3.

¹⁸ None of the parties submitted a copy of CSSD's order, but there is no dispute that CSSD denied Mr. D's modification request.

¹⁹ Ex. 4.

²⁰ Ex. 4.

²¹ 15 AAC 05.030(h).

²² AS 25.27.190(e).

²³ Ex. 1 p. 8; N D hearing testimony.

underemployment is voluntary. The law allows income to be imputed to a parent who is voluntarily and unreasonably unemployed or underemployed.²⁴ In deciding whether an obligor is unreasonably underemployed, the adjudicator “must consider the totality of the circumstances . . . [which] include such factors as whether the obligor's reduced income is temporary, whether the change is the result of economic factors or of purely personal choices, the children's needs, and the parents' needs and financial abilities.”²⁵ A child support obligation will not be modified for an obligor who has reduced income in an effort to decrease child support, since such conduct amounts to bad faith.²⁶ However, a showing of bad faith is not a prerequisite to a finding that unemployment is voluntary.²⁷ Mr. D bears the burden of proving his current earning capacity and of showing that his underemployment or unemployment is not voluntary.²⁸

If a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated from that parent’s “potential income,” which is based on his or her “work history, qualifications and job opportunities.”²⁹

In this case, the preponderance of the evidence indicates that Mr. D's current unemployment is voluntary and unreasonable. Mr. D testified that he cannot obtain employment while living in his current location because he cannot drive, and because the nearest towns with jobs are too far away to hitchhike. This appears to be true. However, Mr. D testified that he moved to his current location in 2010. Mr. D's child support obligation for N was initially established in April 2010.³⁰ Because Mr. D had been working prior to moving to his current location, and because his move occurred and his unemployment began at the time his child support obligation for N was established, the circumstances strongly indicate that Mr. D moved to his present location to avoid paying child support.

Second, prior to this year, Mr. D had not applied for the annual PFD since 2010.³¹ Mr. D's child support obligation for N was established in April 2010.³² Mr. D did not provide any reason

²⁴ Civil Rule 90.3(a)(4); *see also Tillmon v. Tillmon*, 189 P.3d 1022, 1030 (Alaska 2008).

²⁵ *Sawicki v. Haxby*, 186 P.3d 546, 550 (Alaska 2008) (internal citations and quotation marks omitted).

²⁶ *Beard v. Morris*, 956 P.2d 418, 420 at footnote 3 (Alaska 1998); *see also Mansfield v. Taylor*, 480 S.E.2d 752, 755 (Va. 1997) (where one acts purposefully with the desire to evade one's support obligations, or evidences “a careless disregard for one's support obligations,” modification is inappropriate); *accord State Department of Social Services v. Seals*, 701 So.2d 746, 748 (La.App.1997).

²⁷ *Kowalski v. Kowalski*, 806 P.2d 1368, 1371 (Alaska 1991).

²⁸ *Kowalski v. Kowalski*, 806 P.2d 1368 - 1370 (Alaska 1991).

²⁹ Civil Rule 90.3(a)(4).

³⁰ Ex. 1 p. 1.

³¹ Ex. 3 p. 1; N D hearing testimony.

³² Ex. 1 p. 1.

for his decision not to apply for the PFD beginning in 2010. The timing of his action strongly implies that he decided not to apply for his PFD to avoid having it applied in payment of child support.

For the foregoing reasons, Mr. D's former income of \$18,295 must be imputed to him. This figure is the same income on which Mr. D's current child support obligation of \$244 per month is based. Imputing this income means that Mr. D's countable income has not changed since the current child support obligation was set in January 2011. Accordingly, Mr. D does not currently qualify for modification of his child support obligation.³³

IV. Conclusion

Mr. D failed to satisfy his burden of proving that CSSD's denial of modification was incorrect. Mr. D is voluntarily and unreasonably unemployed. Accordingly, CSSD's order denying modification of Mr. D's child support obligation should be affirmed. Further, no variance under Civil Rule 90.3(c) was requested or granted.

V. Child Support Order

- CSSD's Decision on Request for Modification Review dated March 18, 2013 is affirmed;
- Mr. D's child support obligation remains at \$244 per month.

DATED this 3rd day of October, 2013.

Signed

Jay Durych

Administrative Law Judge

³³ Were Mr. D to move to a location where he could once again work "on the docks," and were his income less than it was before, he might well qualify for modification of his child support obligation at that time.

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 21st day of October, 2013.

By: Signed
Signature
Jay D. Durych
Name
Administrative Law Judge
Title

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