IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

M Q,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
STATE OF ALASKA, DEPARTMENT OF REVENUE, CHILD SUPPORT SERVICES DIVISION, and T J. C,	)	
	)	
Appellees.	)	
_____	)	Case No. 3AN-14-00000 CI

ORDER ON APPEAL

This is an administrative appeal of a child support order adopted by Appellee State of Alaska, Department of Revenue, Child Support Services Division (CSSD). Appellant M Q and Appellee T C are the parents of one minor child subject to a child support order entered by CSSD. Q is self-represented in this appeal. CSSD is represented by Nelleene Boothby. C has not appeared in this appeal, but he was represented by Anne DeArmond in the underlying administrative proceedings and she has been served all pleadings and briefings in this matter.[1] This appeal has been fully briefed and there is a pending motion for trial *de novo* filed by CSSD and postponed for decision by Judge Spaan. No party has requested oral argument in this matter.

[1] Agency Record (R) at 4; Order Regarding CSSD's Motion to Join Indispensable Party and Correct Caption, dated February 17, 2015. Initially C was represented by Charles Gunther in the administrative proceedings. R at 60.

I. Facts and Procedure

Q and C are the parents of one child, N E. Q, (DOB 00/00/07).[2] C is additionally the father of three other children born before N.[3] Q has been the primary custodian of N since birth. On April 21, 2008, Q applied for CSSD's services. On April 28, 2008, CSSD sent notice to C of their intent to establish paternity and child support, requesting that he provide income information.[4] This was personally served on him on July 10, 2008 in No Name, Alaska.[5] C never responded and a default order establishing paternity was entered on August 12, 2008.[6]

On October 3, 2008, an administrative child support and medical support order was issued.[7] Due to C's unresponsiveness, CSSD based the child support order on imputed income, not actual income.[8] CSSD concluded that C was a mid-level manager because he was a part-owner of at least two businesses.[9] Based on Alaska's Occupational

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[2] R at 15.

[3] R at 288-299.

[4] R at 23-24.

[5] R. at 27.

[6] Exc at 28. A DNA test was conducted in February of 2008, determining that C was N Q's father.

[7] Excerpts of Record (Exc.) at 1-12.

[8] Exc at 4.

[9] Exc at 4.

Employment Statistics, one management position results in annual income of $74,910.[10] Because he was a part owner of two companies, CSSD multiplied this by two, included a calculation for his Alaska Permanent Fund Dividend,[11] and determined that his adjusted annual income was $110,099.[12] In 2008, the adjusted annual income cap for determining child support was $100,000, therefore C was ordered to pay the statutory rate for one child of 20% of the $100,000 income cap.[13] This resulted in a support order being entered in the amount of $1,667 per month, effective as of April of 2008.[14]

Almost immediately after receiving this child support order, C made multiple unsuccessful attempts to reduce his obligation.[15] To summarize, in 2009, CSSD received several phone calls from C regarding his child support obligation. Then, between 2010 and 2013, C filed at least four Requests for Modification of a Child Support Order,[16] one Request to Reduce Withholding Due to Hardship,[17] one Motion to Vacate Default

[10] Exc at 4.

[11] Exc at 4.

[12] Exc at 7.

[13] Exc at 1, 7.

[14] Exc at 2.

[15] R at 9-11. The pre-hearing brief contains a detailed timeline of events prior through December 9, 2013.

[16] R at 59, 69, 164, 246.

[17] R at 86.

Order,[18] and two Inquiries for Default Review of an Alaska Administrative Child Support Order. [19] All of these requests were denied by CSSD.[20]

After over two years of repeated requests from CSSD to provide financial information, Mr. C submitted the following documents:

-May of 2011: 2008 and 2009 tax returns.[21]
-January of 2012: 2010 tax return.[22]
-February of 2012: 2011 tax return, including information regarding his child support obligations and payments in Virginia for his three prior born children.[23]
-July of 2012: notarized child support affidavit declaring his income as 1,080, with no deductions.[24]
-October of 2012: 11 pages of outstanding creditor bills.[25]
-February of 2013: financial documents including overdue support notices from Arizona;[26] a social security earnings statement;[27] a child support affidavit showing total income of year-to-date income of 6,252 with 2,000 in child support deductions for a total adjusted income of 4,252 for 2012;[28] another

[18] R at 74.

[19] R at 72, 82.

[20] R at 67, 71, 75, 245, 263-268, 269.

[21] R at 79.

[22] R at 83.

[23] R at 108, 125.

[24] R at 151. The affidavit does not state if this is annual or monthly income.

[25] R at 152-162.

[26] R at 167-68.

[27] R at 169-174.

[28] R at 175.

> notarized child support affidavit alleging total yearly income of negative 87,206, total yearly deductions of 12,450, and adjusted yearly net income of negative 99,656 for 2012;[29] a copy of his 2012 tax returns;[30] two un-notarized child support affidavits reflecting negative income for 2011 and 2012;[31] a copy of his 2011 tax returns;[32] a copy of his 2010 tax returns;[33] another child support affidavit reflecting negative income for 2009;[34] a copy of his 2009 tax returns;[35] a copy of his 2008 tax returns,[36] including another child support affidavit showing negative income for 2008.[37]

C's attempts to alter his child support obligations can be lumped into two categories: 1) modification and 2) default review. Currently on appeal is CSSD's review of C's default order – not the modification decision. Different standards apply to these different requests for relief. Modification of a child support order requires the party requesting modification to prove there has been a material change in circumstances that would merit modifying the standing support order.[38] "A material change of circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less

[29] R at 176.

[30] R at 177-84.

[31] R at 185-86.

[32] R at 187-97.

[33] R at 198-214.

[34] R at 215.

[35] R at 216-29.

[36] R at 231-44.

[37] R at 242.

[38] Alaska Civ. R. Proc. 90.3(h)(1).

than the outstanding support order."[39] Modification of a child support order can only be effective on or after the date a motion or notice to modify was filed, and cannot apply retroactively.[40]

Review of a default order for child support is one of the statutory exceptions to the bar against retroactive modification of child support. Under AS 25.27.195(b), CSSD may "at any time, vacate an administrative support order issued by the agency under AS 25.27.160 that was based on a default amount rather than on the obligor's actual ability to pay." This is also CSSD's agency regulation at 15 AAC 125.121. As noted by CSSD, the Supreme Court of Alaska has recognized this limited exception to retroactive modification of child support orders.[41]

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[39] Alaska Civ. R. Proc. 90.3(h)(1).

[40] Alaska Civ. R. Proc. 90.3(h)(2).

[41] *Hendren v. State, Dept. of Revenue, Child Support Enforcement Div.*, 957 P.2d 1350, 1352 (Alaska 1998)("Although CSED can seek the modification of existing support orders under AS 25.27.045, the statutory scheme permits retroactive modification only in limited circumstances. Retroactive modification is explicitly permitted by the statute when paternity is disestablished and the modification can be implemented without violating federal law, *see* AS 25.27.166(d), or on the motion of the obligor when there is a clerical mistake or the support order is based on a default amount. *See* AS 25.27.195. The implication of these sections is that, except in these defined circumstances, courts may not retroactively modify support orders. CSED's interpretation of AS 25.27.120(a) is therefore incorrect because it would permit such

Accordingly, CSSD handled C's requests for modification differently from his requests for default review. The modification requests were all denied by CSSD, and an appeal on one of these denials was heard by Administrative Law Judge (ALJ) Jay Durych, who issued a decision affirming denial of modification on October 8, 2013.[42] At this hearing, C presented his tax returns and he testified. Judge Durych specifically made an adverse credibility determination against C.[43] Judge Durych ultimately found that C had failed to establish by a preponderance of evidence that "his current income had decreased sufficiently that his child support obligation should be modified."[44] Therefore the default child support order remained in place.[45] This administrative decision was never appealed.

On October 14, 2013, CSSD denied all of C's requests for relief regarding the default determination of his income, concluding that C had failed establish his actual income from 2008 through October of 2013.[46] C, through counsel, administratively

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modifications, like the reimbursement award in this case, in circumstances in which retroactive modification is not permitted."); *Teseniar v. Spicer*, 74 P.3d 910, 915 (Alaska 2003); *Swaney v. Granger*, 297 P.3d 132, 136 at n. 13 (Alaska 2013).

[42] R at 263-67.

[43] R at 266-67.

[44] R at 267.

[45] R at 267.

[46] Exc. at 14; R at 269.

appealed this denial on November 13, 2013, claiming that CSSD erred by not including a deduction for child support obligations that he pays for three prior children, and claiming CSSD erred by not calculating his actual income.[47]

This appeal was assigned to ALJ Mark Handley.[48] Ms. Q was represented by Kieth Cassidy, an attorney for Tompkins County Department of Social Services in New York.[49] CSSD was represented by Andrew Rawls. Mr. C was represented by Anne DeArmond.

A total of 27 exhibits were filed by C including corporate tax returns from 2008 to 2012, miscellaneous business receipts from 2008 to 2012, bank statements and other financial documents for C's businesses from 2008 to 2012, a child support order and statement from Virginia for C's 3 prior children, a payment report for child support in Virginia, a promissory note, and a table accounting for C's income from 2008 to 2012.[50] These exhibits were different from the previously filed documents submitted to CSSD by C.[51]

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[47] R at 272.

[48] R at 272.

[49] R at 1024; Tr. at 34.

[50] R at 1005-1006.

[51] Hearing Transcript (Tr.) at 33. C's previously submitted documents were his personal income taxes. The exhibits submitted by his attorney consisted of tax returns for the businesses he had an interest in.

Three separate hearings were conducted by ALJ Handley. The first hearing was a status conference at which the parties agreed to continue the hearing for a later date. Prior to this hearing, Ms. DeArmond submitted five unsigned child support affidavits calculating C's income for 2008, 2009, 2010, 2011, and 2012.[52] At the hearing, the ALJ requested that CSSD submit child support calculations for these years using both CSSD's calculation of C's income and Ms. DeArmond's calculation of C's income.[53] At this status hearing, Q's attorney specifically raised the issue that C's income affidavits were unsigned and un-notarized.[54] The ALJ left it up to the parties to conduct more discovery on this point.[55]

On March 10, 2014, CSSD provided child support calculations based on C's unsigned financial affidavits for tax years 2008 through 2012, and then used the average income to determine the obligation for 2013 and 2014.[56]

At the second hearing, the ALJ initially stated that his role was solely to review whether the agency was incorrect in the exercise of its discretion, and if remand was necessary for them to conduct a new default review.[57] The ALJ was originally under the

[52] R at 1032-37.

[53] Tr. at 8-9.

[54] Tr. at 13.

[55] Tr. at 14.

[56] R at 1040-47.

[57] Tr. at 23.

assumption that CSSD had denied C's default review because it determined that he did not timely file his financial information.[58] The ALJ stated that "I'm not going to go through every year of child support, its' the agency's job, you know, to take the first bite at the so-to-speak and then give both parents an opportunity to appeal the agency."[59] The parties clarified that CSSD did review C's documents and determined that no income could be calculated from them, and therefore maintained the default calculations.[60]

The ALJ noted that C's "income information is pretty complicated," and that he would have liked to remand the issue back to CSSD to determine actual income based on his records and his testimony, rather than rule on their decision to maintain the imputed income.[61] "[W]hat you really need to do is have the obligor, you know, file a coherent position about what - - and supportable position about what his income was during the relevant years, let the Division review that and then just make a determination."[62] The ALJ then asked for Q's consent to remand this case back to CSSD and give C "another chance to put together a coherent position on his income for the relevant time periods."[63]

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[58] Tr. at 23.

[59] Tr. at 23.

[60] Tr. at 28.

[61] Tr. at 28.

[62] Tr. at 29.

[63] Tr. at 29.

Ms. Q declined that request,[64] and maintained her opposition to lowering the support amount in light of the prior ALJ's order denying Modification.[65]

CSSD clarified that they too did not want a remand. "[A]n order was issued because, for years now, this case has been bouncing around the agency with no finality and - - and the case needs finality."[66] CSSD then proposed that C submit his calculations, CSSD present its calculations, and that the ALJ issue a final ruling.[67] The ALJ warned the parties that they were skipping a step in the review process by not having CSSD determine C's actual income,[68] but they all consented to a final determination by the ALJ.[69]

CSSD and Anne DeArmond submitted proposed income calculations for C,[70] and a third and final hearing in this matter was held. At that hearing, it was apparent that the prior decision by ALJ Durych denying C's modification complicated the proceedings to review the default determination. ALJ Handley initially wished only to determine income

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[64] Tr. at 30.

[65] Tr. at 28.

[66] Tr. at 30-31.

[67] Tr. at 31.

[68] Tr. at 32-34.

[69] Tr. at 31, 34,

[70] R at 1048-48; R at 1054-55; R at 1032-37. Some of these documents were presented post-hearing.

amounts for past time periods that were not subject to ALJ Durych's order.[71] C's counsel argued that because ALJ Durych's decision kept the default order in place, and because statutorily C could seek review of any support order based on default, ALJ Handley had the authority to hear the evidence and determine C's actual income from 2008 to the present and then enter a retroactive and prospective child support order for each of those years.[72]

Q's counsel took the position that because C had a full opportunity to present his income calculations to ALJ Durych, and because ALJ Durych had ruled that C was unable to prove his actual income, ALJ Handley should rule consistent with that finding and maintain the default amount.[73] Q's counsel specifically argued that the same evidence was presented in both this hearing and at ALJ Durych's hearing, and it would be inconsistent to find that he proved his income over the relevant time periods when another administrative judge had already ruled inapposite.[74] CSSD requested that ALJ Handley simply make an income determination for each year based on the evidence presented.[75]

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[71] Tr. at 44-45.

[72] Tr. at 47-48.

[73] Tr. at 49; R at 1053.

[74] Tr. at 49.

[75] Tr. at 51.

Ms. DeArmond then spent a significant amount of time presenting and explaining each exhibit and how she calculated Mr. C's income for each year, with CSSD and the ALJ occasionally questioning Ms. DeArmond regarding her calculations.[76] Both Ms. DeArmond and CSSD discussed and argued the proper way to account for depreciation, owner draws, income interest, and other tax allowances for child support purposes.

The only witness to testify at the hearing was C. After he was sworn in, CSSD, the ALJ, and Ms. DeArmond asked him a cumulative total of 14 questions.[77] Q's attorney requested that the court have C submit sworn income affidavits and an affidavit that the exhibits presented were accurate.[78] C's counsel offered to have C testify on the record at the hearing as to the accuracy of the exhibits and the income affidavits, but ALJ Handley requested that he review the documents and serve a written affidavit of affirmation on the parties.[79] Ms. DeArmond also inquired if she had to move to admit the exhibits, and the ALJ said "Oh no, it's okay. With everything - - generally speaking, unless somebody has a specific objection to any of the exhibits, then they all come into the record and I haven't' heard anything. We could take it up if anybody does have an objection to specific exhibits, but okay. Hearing none, then so everything comes in."[80] Judge Handley

[76] Tr. at 53-80.

[77] Tr. at 80-83, 86-87.

[78] Tr. at 89.

[79] Tr. at 89-90.

[80] Tr. at 91.

requested that CSSD provide a new calculation for C's 2010 income, set a deadline for closing briefs, and adjourned the hearing.[81]

The ALJ entered his decision on June 9, 2014, and it was adopted by the Commissioner of Revenue on July 11, 2014.[82] The ALJ found that it was more likely than not that C's estimated income, as presented by his attorney, was the best estimate of his actual earnings during the periods covered by his default order.[83] Accordingly, the ALJ adopted the unsigned child support affidavits that C's attorney submitted as his income, and the ALJ adopted CSSD's calculation of C's child support obligation based on these income figures.[84] Ms. Q filed a timely notice of appeal and ALJ Handley's decision, adopted by the Agency, is now on review before this court.

II. Positions of the Parties

Q filed three points of appeal that essentially state 1) there was insufficient evidence to support the ALJ's decision; 2) C concealed income; and 3) CSSD previously denied C's request to modify support.[85] In briefing, Q argues that C submitted a large volume of documents in an attempt to confuse and conceal income.[86] Q also argues that

[81] Tr. at 87-88, 92.

[82] Decision and Order, *In re: C*, OAH No. 13-1667-CSS at 5-6 (July 11, 2014) (D&O).

[83] D&O at 3.

[84] D&O at 5; R at 1032-37, 1041-47.

[85] Notice of Appeal: Statement of Points.

[86] Appellant's Brief at 1-2.

none of C's exhibits or income affidavits were properly notarized or otherwise verified by him,[87] that he provided insufficient information to determine his actual income,[88] that he owns a significant amount of assets that were not used to calculate his support obligation,[89] and that CSSD previously found that C was not credible and that this finding should be followed.[90] Q also contends that C owns at least four businesses, two of which were not subject to disclosure during the underlying proceedings, and she submitted printouts from the State of Alaska Division of Corporations and Professional Licensing regarding these business entities with this appeal.[91]

Q further argues that the ALJ's decision was an impermissible retroactive modification of a child support order,[92] that C owes past due medical support,[93] that C should not be allowed to take a deduction for prior born children subject to a support order,[94] and that she received ineffective assistance of counsel in the underlying matter.[95]

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[87] Appellant's Reply Brief at 2.

[88] Appellant's Brief at 2.

[89] Appellant's Brief at 2; Appellant's Reply Brief at 2.

[90] Appellant's Reply Brief at 2. Ms. Q, self-represented in this appeal, characterizes this determination as being made by A.J. Rawls, CSSD's counsel.

[91] Appellant's Brief at 1 and Attachments.

[92] Appellant's Brief at 2; Appellant's Reply Brief at 3.

[93] Appellant's Brief at 3.

[94] Appellant's Reply Brief at 2.

CSSD's position is that Judge Handley did not abuse his discretion, that many of Q's points on appeal were waived, and that the agency's decision should be affirmed.

CSSD is the only appellee to file briefing in this matter; neither C nor his counsel have filed anything in this current appeal. Prior to briefing, CSSD filed a motion for a trial *de novo* based on Q's allegation of evidence that was not presented at the original hearing. CSSD cited Appellate Rule 609(b), and argues that Q's claim that C submitted inaccurate or incomplete information in the underlying proceedings creates a factual dispute appropriate for resolution in a trial *de novo*. CSSD also informed the court that it would not be participating in any such trial or in this appeal. Q opposed the motion for a *de novo* trial; however, as stated in CSSD's reply and Q's Reply Brief, it appears she did not understand CSSD's motion as it would actually benefit her position. CSSD also clarified that should a trial *de novo* be granted, they would only participate upon request of the court.

Judge Spaan initially denied CSSD's request for a trial *de novo*, basing this denial on a misunderstanding that the underlying record on appeal had not been prepared.[96] Judge Spaan also noted that *de novo* review is "seldom warranted and is typically granted

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[95] Appellant's Reply Brief at 3.

[96] Order Regarding CSSD's Request for Trial de Novo and Notice of Non-Participation, dated June 15, 2015.

only under certain circumstances."[97] On June 23, 2015, Judge Spaan vacated this denial, noting that the appeal record had been prepared.[98] Judge Spaan indicated that CSSD's motion would be ruled upon after reviewing Appellant's initial brief.[99] On January 6, 2016, this matter was administratively reassigned to the undersigned.[100]

III. Jurisdiction

This is an appeal of a final determination of an administrative agency and the Superior Court has jurisdiction under AS 22.10.020(d), AS 25.27.210, AS 44.62.305, and Rule 601 of the Alaska Rules of Appellate Procedure.

IV. Standard of Review

Superior Court review of an administrative decision made by the Department of Revenue is statutorily governed by AS 25.27.220. The pertinent part reads as follows:

> (b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not

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[97] Order Regarding CSSD's Request for Trial de Novo and Notice of Non-Participation, dated June 15, 2015 (*citing S. Anchorage Concerned Coal., Inc. v. Mun. of Anchorage Bd. of Adjustment*, 172, P35 774, 778 (Alaska 2007)).

[98] Order Regarding CSSD's Motion and Memorandum to Vacate Order Issued June 15, 2015.

[99] Order Regarding CSSD's Motion and Memorandum to Vacate Order Issued June 15, 2015.

[100] On November 30, 2016, this matter was reassigned to Judge Olson; however, Ms. Q filed a preemptory challenge that was granted.

> supported by the findings, or the findings are not supported by the evidence.

Depending on the inquiry, one of four different standards of review will apply:

> (1) the "substantial evidence" test applies to questions of fact;
> (2) the "reasonable basis" test applies to questions of law involving agency expertise;
> (3) the "substitution of judgment" test applies to questions of law where no expertise is involved; and
> (4) the "reasonable and not arbitrary" test applies to questions about agency regulations and the agency's interpretation of those regulations.[101]

"The substitution of judgment standard . . . applies where the agency's expertise provides little guidance to the court or where the case concerns statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and expertise."[102] "The 'substitution of judgment' test is equivalent to de novo review and requires that we 'adopt the rule of law that is most persuasive in light of precedent, reason, and policy.'"[103]

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We will uphold the [Agency]'s decisions as to the

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[101] *Lakloey, Inc. v. Univ. of Alaska*, 157 P.3d 1041, 1045 (Alaska 2007) (citing *Handley v. State*, 838 P.2d 1231, 1233 (Alaska 1992)).

[102] *N. Alaska Envtl. Ctr. v. State, Dep't of Natural Res.*, 2 P.3d 629, 633 (Alaska 2000)(internal quotations omitted).

[103] *Oels v. Anchorage Police Dep't Employees Ass'n*, 279 P.3d 589, 595 (Alaska 2012)(internal quotations omitted).

credibility of witnesses, if such decisions are supported by substantial evidence, as [i]t is not this court's role to reweigh the evidence."[104] "The question of whether the quantum of evidence is substantial is a legal question. Despite the existence of conflicting evidence, we will uphold the [Agency]'s decision if it is supported by substantial evidence. It is not our role to reweigh the evidence, and the [Agency] has the sole power to determine the credibility of witnesses."[105] However, "[i]n determining whether evidence is substantial, [the court] must take into account whatever in the record fairly detracts from its weight."[106]

VI. Discussion

ALJ Handley's decision was barred by principals of collateral estoppel because C previously fully and fairly litigated the determination of his current income, a decision was reached on the merits by the same administrative body, and this decision was essential to the prior proceedings. Additionally, there was not substantial evidence to support the ALJ's income determinations. Although the record is voluminous with financial information, no witness verified any of the exhibits, and C's testimony was so sparse that no determination could have been made.

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[104] *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2002)(internal quotations omitted).

[105] *Williams v. State, Dep't of Revenue*, 938 P.2d 1065, 1079 (Alaska 1997).

[106] *Shea v. State, Dep't of Admin., Div. of Retirement and Benefits*, 267 P.3d 624, 630 (Alaska 2011).

1. Collateral Estoppel applies to C's attempt to re-litigate his income determination by CSSD.

In this case, the Department of Revenue has adopted two inconsistent final decisions regarding C's income and support obligations. ALJ Durych's decision, adopted by the Department on November 4, 2013, made a specific finding that C failed to establish his income after testimony and evidence of his income were presented for 2008 through 2012.[107] ALJ Handley's decision, adopted by the Department on July 11, 2014, found that C was able to establish his income from 2008 through 2014. These two orders raise concerns of collateral estoppel, which is an issue of "statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and expertise,"[108] and therefore the substitution of judgment standard of review applies.

In *State of Alaska, Child Support Enforcement Division v. Bromley*, the Alaska Supreme Court provided a recitation of preclusion principles in the context of a child support order:

> Res judicata (claim preclusion) prevents relitigation of claims that already have or should have been decided in previous lawsuits: 'Once a judgment on the merits of a controversy has been entered, res judicata bars subsequent actions between the same parties on the same claim or on claims that were required to be brought in the original proceeding.' The related doctrine of collateral estoppel (issue preclusion) prevents

[107] R at 263-68.

[108] *Northern Alaska Environmental Center v. State, Dep't of Natural Resources,* 2P.3d 629, 633 (Alaska 2000)(*quoting Kelly v. Zamarello,* 486 P.2d 906, 916 (Alaska 1971).

relitigation of an issue already litigated and decided, barring relitigation where:

> (1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action; (2) the issue precluded from relitigation is identical to the issue decided in the first action; (3) the issue was resolved in the first action by a final judgment on the merits; and (4) the determination of the issue was essential to the final judgment.

Both finality doctrines aim to prevent parties from "again and again attempt [ing] to reopen a matter that has been resolved by a court of competent jurisdiction." Principles of finality may be applied to the decisions of administrative agencies if, after case-specific review, a court finds that the administrative decision resulted from a procedure "that seems an adequate substitute for judicial procedure" and that it would be fair to accord preclusive effect to the administrative decision.

We apply finality principles slightly differently in the context of child support enforcement. In *Bunn v. House*, we noted that Rule 90.3(h)(1)'s modification procedure "provides an exception to the general principle that final judgments should not be disturbed" and declined to articulate finality principles in preclusion terms. But we emphasized the importance of finality:

> Some courts articulate [statutory modification procedures] in terms of res judicata. That is, they hold that a child support decree is res judicata unless and until there is a material change of circumstances which opens the door to modification. While we believe that such motions to modify child support, under Alaska law, do not technically raise res judicata concerns, the principle of finality is a good one.... A party should not be allowed to relitigate the same facts in the hope of gaining a more favorable result.[109]

The bar against retroactive modification of child support stems from these preclusion principals, but it has also been codified in Rule 90.3(h)(2) of the Alaska Rules of Civil Procedure. Further, the Alaska Supreme Court has held that retroactive

[109] *State of Alaska, Child Support Enforcement Division v. Bromley*, 987 P.2d 183, 192-93 (Alaska 1999)(internal citations omitted).

modification of an existing child support order "is allowed only where it is explicitly permitted by statute."[110] Alaska Statute 25.27.195 is one of those few statutory exceptions to the bar on retroactive modification of child support orders.[111] Subsection (b) of this statute provides that "[t]he agency may, at any time, vacate an administrative support order issued by the agency under AS 25.27.160 that was based on a default amount rather than on the obligor's actual ability to pay." Here, C's 2008 support order was based on a "default amount," not his actual ability to pay,[112] and would thus be subject to permissible retroactive change under the statute.

The Department of Revenue adopted 15 AAC 125.121 to implement AS 25.27.195(b) and provide child support obligor's a means to modify their default support orders. These were the proceedings that C initiated with CSSD that ultimately were appealed to ALJ Handley, and are now presently before this court.

However, prior to Judge Handley's decision, C had simultaneously initiated agency proceedings to modify his support obligation pursuant to 15 AAC 125.316. These modification proceedings only applied prospectively to C's child support obligation after

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[110] *Id.* at 188.

[111] *Hendren v. State, Dep't of Revenue*, 957 P.2d 1350, 1352 (Alaska 1998).

[112] Exc at 4. 15 AAC 125.121(j)(1)(B) defines a "default" support order as one in which income was imputed by the agency based on statistical wage data provided by the Department of Labor and Workforce Development. C's income was imputed in this manner. Exc at 4.

the date he filed for modification.[113] These proceedings were also appealed to the Office of Administrative Hearings. A hearing before ALJ Durych was held on May 8, 2013, C appeared, assisted by his mother; Q appeared unrepresented; and Andrew Rawls appeared representing CSSD.[114] C submitted personal income and tax records from 2008 to 2012,[115] C and Q testified,[116] and ALJ Durych specifically found that C "failed to prove that there has been a material change of circumstances since his current child support obligation was set in October of 2008."[117] ALJ Durych specifically ordered that the October 3, 2008 child support order remain in effect.[118]

It was not until after this order was issued that ALJ Handley heard C's appeal of CSSD's denial to adjust his default income determination. The parties and the ALJ were clearly confused as to how to proceed in light of ALJ Durych's order, and ALJ Handley was initially concerned with issuing an order that contradicted ALJ Durych's prior order.[119] This concern was valid and should have been analyzed in the context of collateral estoppel.

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[113] 15 AAC 125.321(d); Alaska Civ. R. 90.3(h)(2).

[114] R at 266.

[115] R at 265.

[116] R. at 263-66.

[117] R. at 267.

[118] R. at 267.

[119] Tr. at Tr. at 44-48; R at 1053.

As previously quoted, collateral estoppel has four elements: 1) the same parties, 2) identical issue, 3) final judgment, and 4) the issue was essential to the judgment.[120] Here, it is undisputed that both proceedings involved the exact same parties. Further, ALJ Durych's decision became final on November 4, of 2013,[121] which was prior to C's appeal of his default determination on November 13, 2013.[122] As discussed below, the issues before ALJ Durych and ALJ Handley were identical and the issue was essential to ALJ Durych's final decision.[123]

The issue for ALJ Durych to decide was whether C's support obligation on and after the date he filed for modification (December 12, 2012) had materially changed from the 2008 order of $1,677 in monthly support payments.[124] At the hearing, C's argument

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[120] *State of Alaska, Child Support Enforcement Division v. Bromley*, 987 P.2d 183, 192-93 (Alaska 1999)(internal citations omitted).

[121] R at 268.

[122] Exc. 16.

[123] To determine if an issue is identical, the court looks to various factors including overlap in evidence and argument advanced in both proceedings, rules of law involved in both proceedings, whether pretrial preparation and discovery would be expected to cover the same issues in both proceedings, and how closely related the claims are in both proceedings. *Powercopr Alaska, LLC v. Alaska Energy Authority*, 290 P.3d 1173, 1182 (Alaska 2012)(quoting Restatement (Second) of Judgments § 27 cmt. c. (1982).

[124] Alaska Civ. R. Procedure 90.3(h)(1); *Ward v. Urling*, 167 P.3d 48, 52-53 (Alaska 2007).

was that his actual income was much lower than the income determined by default, and that his default order did not account for child support obligations he had for three prior born children. To prove this, C presented tax records from 2008-2012 and testified about his current and prior financial situation.[125]

ALJ Durych considered C's past earnings, but did not make a specific finding as to any particular tax year. Rather, ALJ Durych found as follows:

> Mr. C bears the burden of proving his current earning capacity. While Mr. C *may* currently be earning less income than he was in 2008, he did not prove this by a preponderance of the evidence because his testimony regarding his current income was not credible. Based on the evidence in the record, it cannot be said that it is more likely than not that Mr. C's income has decreased sufficiently that his child support obligation should be modified. Mr. C has therefore failed to prove that there has been a material change of circumstances since his current child support obligation was set in October 2008. Accordingly, Mr. C does not currently qualify for modification of his child support.[126]

Had C been able to establish his actual income for any given prior tax year and show that it was lower than the default income determination from 2008, ALJ Durych would have had to address that finding in his modification decision. [127] If such a finding were made, then modifying *and* vacating the 2008 default order would have been appropriate, as he would have established his actual income. However, that did not

[125] R. at 263-65. The transcript of this hearing is not in the record before this court.

[126] R. at 267.

[127] Current earnings capacity is often based on testimony and documentation of prior earning history *See Ward v. Urling*, 167 P.3d 48, 54 (Alaska 2007).

happen. ALJ Durych made a specific adverse credibility determination as to C's testimony and further declined to take the tax records at their face value.[128] Thus, ALJ Durych determined that C's child support obligation for 2013 had not materially changed since 2008, this determination was essential to ALJ Durych's decision to uphold CSSD's denial of modification, and this determination precluded ALJ Handley's subsequent conflicting determination.

Although AS 25.27.195(b) shows that there is a strong policy in favor of determining child support based on actual income rather than a default figure, C had a full and fair chance to present his evidence and argument as to his actual income with ALJ Durych. ALJ Durych reviewed that evidence, heard the argument, and determined that C had failed to prove his actual income for the same time periods for which ALJ Handley was later requested to make a determination, based largely on the same evidence.[129] "A party should not be allowed to relitigate the same facts in the hope of gaining a more favorable result,"[130] and C should not have been given a second chance to collaterally attack ALJ Durych's determination.

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[128] R. at 266-67

[129] While C submitted additional exhibits including corporate tax returns to ALJ Handley, they were of the exact same nature of evidence that he presented in the first hearing and there is no reason they could not have been produced in ALJ Durych's proceedings.

[130] *State of Alaska, Child Support Enforcement Division v. Bromley*, 987 P.2d 183, 192-93 (Alaska 1999).

2. The ALJ's decision of C's income was not based on substantial evidence.

Even if C's request to vacate the default support order is not precluded, he did not present substantial evidence for ALJ Handley to make a determination of his actual income. ALJ Handley did note that "[t]he record in this case is very voluminous for a child support case and includes several years of the tax records of Mr. C and his complex business interests."[131] ALJ Handley then found that "C, through his attorney, made a good faith effort to provide reliable information on actual income."[132] These findings were based on exhibits submitted by C's counsel and C's counsel's argument. But viewing the record as a whole, this evidence is insufficiently reliable and not a substantial basis for the ALJ's decision.

Here, C had the burden to prove that CSSD's October 14, 2013 denial of his request for relief from the default administrative child support order was incorrect. Under 15 AAC 05.030(h), although hearings are not conducted according to technical rules of evidence, evidence must still be sufficiently reliable. Further, "[o]ral evidence may be taken only on oath or affirmation," and "the person requesting the hearing has the burden of proving that the action by the department to which that person objects is incorrect."[133] While ordinarily a fact finder may sufficiently rely on exhibits of financial records,

[131] D&O at 4.

[132] D&O at 3.

[133] 15 AAC 05.030(h).

testimony, and a reasonable explanation by a party to make a factual determination, the record of C's income in this case lacks reliability.

The bulk of the evidence in this case was presented by C's attorney, Ann DeArmond, and her "distilling of Mr. C' business bank records and tax returns."[134] For nearly 40 pages of the 92 page hearing transcript, Ms. DeArmond explained exhibits, presented tables she drafted, and answered questions posed by the ALJ and CSSD regarding C's income.[135] Ms. DeArmond admitted that

> "Perhaps I could explain how I arrived at these numbers. You know, Mr. C' ability to answer specific questions about that, you know, other than providing foundation that, you know, these are indeed his bank and tax records, I don't know if he's honestly going to be able to answer questions about how I put it together, but maybe if I can at least set forth how I arrived at my numbers, then the Court can have an understanding of how that's occurred."[136]

Ms. DeArmond, despite admitting "I can't claim to be an expert in tax preparation or the operation of the depreciation," then presented her calculation of C's income based on her interpretation of his bank, tax, and business records,[137] She was also cross examined by CSSD and questioned by the ALJ specifically regarding C's business records, tax records, distributions, income, and her calculations.

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[134] Tr. at 51.

[135] Tr. at 51-80, 83-85.

[136] Tr. at 51-52.

[137] Tr. at 59.

C was the only witness sworn in at the hearing to testify, his testimony spans a total of 5 pages of the 92 page hearing transcript,[138] and he was asked a cumulative total of 14 questions. He testified that one of his businesses did not make any money, that he received cash distributions from his partners in amounts they determined and at times they determined, and that he could not recall any specific amounts he received at any given time.[139] He completely deferred the explanation of his tax and business records to Ms. DeArmond because "it's complicated and I'm usually the guy in the field doing the work my partner handles a lot of the paperwork."[140]

Q's attorney specifically raised the issue that C's income affidavits were unsigned and that his exhibits were never authenticated.[141] The ALJ then ordered him to submit sworn statements after he had a chance to review the underlying documents.[142] The current record on appeal contains no such sworn statements or verification. But the record does contain sworn income affidavits previously filed with CSSD by C that conflict with

[138] Tr. at 80-82, 86-87. The first 40 pages of the hearing transcript are procedural issues, the next 40 were Ms. DeArmond's arguments/testimony, and the final pages were a mix of C's testimony and procedural discussions between the parties.

[139] Tr. at 80-82, 86-87.

[140] Tr. at 80.

[141] Tr. at 89; R at 1062.

[142] Tr. at 89-90.

the ones drafted and submitted by his attorney.[143] Although the reasons for those conflicting affidavits were explained by Ms. DeArmond (he was using gross income as calculated for tax purposes including depreciation, which is not allowable for child support calculations),[144] the result is that the record has a sworn set of affidavits that are clearly unreliable, and an unsworn set of affidavits, based on unsworn testimony from counsel, that were used to calculate C's actual income.

There was also a finding that C "through his attorney has made a good faith effort to make a reasonable estimate of his income for child support purposes,"[145] but this appears more to be a credibility determination of Ms. DeArmond, not Mr. C. Although this court's role is not to re-determine C's credibility, there is simply no substantial evidence to support any credibility determination in the first place – C essentially answered 'I don't know' regarding his income and there was an existing ALJ decision that sets forth facts contradicting these statements.

Further, there is a large amount of C's information lacking from the ALJs order and the record on appeal. After a review of the hearing transcript, decision and order, and four volumes of agency records, it is unclear exactly what Mr. C does for a living. The only document that provides that information is ALJ Durych's decision in which C was

[143] R at 86-89, 151, 175, -76, 185-86.

[144]

[145] D&O at 1; *Id.* at 5.

found not to be credible.[146] At the hearing with ALJ Durych, it appears that C provided significantly more substantive testimony regarding his income than what was presented to ALJ Handley.[147] It is also unclear from the record on appeal as to what C is currently paying in child support for his three prior children. He may be entitled to a credit for these payments, but Civil Rule 90.3 requires that he prove the prior obligation is actually being paid.[148] Though there is evidence that C owes a significant amount of child support for three prior born children, it is unclear from the record if he is making actual payments.[149]

While "C *may* currently be earning less income than he was in 2008,"[150] the agency record does not contain substantial evidence to support ALJ Handley's income

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[146] R. at 267.

[147] ALJ Durych specifically cited testimony from both C and Q at the hearing. C apparently testified that he was a truck driver, but stopped in 2012 and now operates an excavator; that he owns interests in several companies; that he draws $2,000 per month from one of the companies; that his draws are in cash; that one business owns rental property managed by a professional third party; and that the businesses cover many of his living expenses. R. at 263, fn1, 263-65.

[148] Alaska Civ. R. of Procedure 90.3, cmnt. D(2).

[149] *See* Withholding Order from Virginia, R. at 138; *Pendente Lite* Order and attached summary case account statements, R at 291-305.

[150] R at 267. ALJ Durych's statement is just as true for this instant appeal as it was for the prior decision and order.

findings.[151] Although Administrative Proceedings are not bound by the formal Rules of Evidence, Q requested that C verify his income affidavits and exhibits, which never happened. Furthermore, neither C nor any other witness provided testimony of C's income.

3. The ALJs finding that C was not hiding assets was not an abuse of discretion.

Q argues on appeal that C has extensive business holdings, assets, and undisclosed income, and that the ALJ erred by not making such a finding. The record on appeal, including Q's filings, does not provide enough evidence to support these allegations. The only evidence of these hidden assets that Q can point to are four businesses that C is publically listed as having an ownership interest in, a property tax assessment, and a listing of lottery winners for remote recreation cabin staking offers from the State of Alaska.[152] No value of these assets and no income derived from these assets was ever alleged.

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[151] It should be noted that no party has taken any issue with CSSD's decision to simply multiply the statistical gross annual income for a management position by 2 based on the fact that C is a part owner of two businesses. While a plausible argument may have been made that having an ownership interest in two business entities is qualitatively different than working two full time jobs as a manager, the method of imputing income was not challenged and is not currently under review.

[152] Appellant's Brief, attachments. It also appears that at least one business entity is inactive or expired.

These documents, by themselves, do not support a finding that C is hiding income. Further, as noted in the transcript and in ALJ Handley's decision, Q and her attorney were afforded an opportunity to complete discovery and question C on this issue.[153] Just as it is true that C *may* be earning less income than was imputed to him, it is also "possible that Mr. C is hiding income and assets."[154] But, there simply is not the requisite amount of evidence to prove this assertion, and the ALJ's decision in this regard was not an abuse of discretion.

4. Retroactive Modification of a Default Child Support Order is Permissible.

As previously discussed, retroactive modification of a child support order that was based on a default income calculation is one of the few, explicit, statutory exceptions to the general bar against retroactive modification.[155] Had the matter not already been heard and decided by ALJ Durych, and had C presented substantial, reliable evidence, ALJ Handley's decision would have been a proper retroactive modification.

5. Q has not properly presented her claims for medical support arrears.

This current appeal is based on C's dispute with CSSD regarding the determination of his income. It was not until the appeal to the Superior Court that Q raised the issue of past due medical support. C does have a medical support obligation

[153] Tr. at 44; D&O at 4.

[154] D&O at 4.

[155] AS 25.27.195(b).

under the 2008 order, which continues to this day.[156] Ms. Q would be eligible for reimbursement of uncovered medical expenses the child has incurred pursuant to this support order. However, this claim would require proof of the expense and proof of the payment. No proof has been submitted to this court.

The proper procedure for Q to collect reimbursement for uncovered medical expenses would be for her to file a motion with this court, including documentation and evidence of the uncovered medical expenses, and request that the amount due be reduced to a judgment.[157] She may then present that judgment to CSSD for enforcement.[158]

6. Request for Trial *De Novo*

The request for a *de novo* trial is denied as it would not be helpful in resolving the matters at issue.

V. Conclusion

This case has been a long, drawn out, and frustrating battle over a complicated and confusing issue. The court understands the desire of the parties to reach finality regarding C's past income. But that issue was resolved by Judge Durych as of November 4, 2013.

The Decision and Order adopted by the Department of Revenue on July 11, 2014 is vacated and the Child and Medical Support Order issued on October 8, 2008 is reinstated. Each party maintains their right to periodically review the record, request

[156] Exc. at 4.

[157] 15 AAC 125.431.

[158] *Id.*

financial documents from each other, and file prospective modification requests. But any such modification request is not apply to years 2008 through 2013, as that would conflict with Judge Durych's decision. This matter is remanded to the Department of Revenue for further proceedings not inconsistent with this order.

ORDERED this 15 day of July, 2016 at Anchorage, Alaska.

Signed
Hon. Herman Walker, Jr.,
Superior Court Judge

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