

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

In the Matter of:)	
)	OAH No. 14-0968-CSS
N J. T)	CSSD No. 001175626
_____)	

DECISION AND ORDER

I. Introduction

D Q has appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in Mr. T’s case on May 7, 2014. The obligee children are K, 17 years old; and B, 14 years old.

The formal hearing was held on June 26, 2014. Both parties participated by telephone. Russell Crisp, Child Support Specialist, also appeared telephonically. The hearing was recorded.

Based upon the record and after careful consideration, the Modified Administrative Child Support and Medical Support Order dated May 7, 2014 is vacated. Mr. T remains liable for child support for K and B of \$966 per month.

II. Facts

A. Procedural History

Mr. T’s child support obligation for K and B was set at \$966 per month in March 2012.¹ On January 30, 2014, Mr. T requested a modification review.² On January 31, 2014, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Ms. Q submitted income information, but Mr. T did not.⁴ On May 7, 2014, CSSD issued a Modified Administrative Child Support and Medical Support Order that reduced Mr. T’s child support to \$533 per month, effective February 1, 2014.⁵ Ms. Q appealed on June 1, 2014, asserting that Mr. T is voluntarily unemployed and has made no effort to find work, and that CSSD’s determination that his income potential is \$15 per hour is incorrect.⁶ Prior to the hearing, CSSD filed an

1 Exh. 1.
2 Exh. 2.
3 Exh. 3.
4 Exh. 4.
5 Exh. 5.
6 Exh. 6.

affidavit that states the Alaska Department of Labor and Workforce Development database does not show any employer-reported wages for Mr. T since the third quarter of 2007.⁷

B. Material Facts

Mr. T and Ms. Q have two children, K and B. The children live most of the time with Ms. Q but the parties share custody of the children on a 70/30 basis, in which Mr. T has them overnight approximately 30% of the year.⁸

Mr. T is currently unemployed. His previous occupation involved working with fiber optic cable for a telecommunications company. He was previously employed through 2007. He testified that he left his last job because he could no longer discern red, orange and yellow colors, and as a result, could not work with fiber optic cable.

Since 2007, Mr. T has supported himself on unemployment benefits, savings and his retirement account. Beginning in 2009, Mr. T withdrew \$50,000 each year from his 401(k) account. At his previous hearing in 2012, he said he had approximately \$73,000 remaining in his account, so he knew that he would exhaust his retirement funds within a year or two.⁹ In spite of this knowledge, Mr. T had not made serious efforts to find employment in 2012; in fact, not since his prior job ended in 2007. Nor has he done so since 2012. Yet Mr. T was able to work in 2012, and he remains so to this day. At the hearing in the current appeal, Mr. T testified that he had an appointment with a potential employer for work that would involve *fiber optics*.

When asked why did had not tried to get a job that paid \$15 per hour, Mr. T stated that there was “not much sense in bothering with it.”¹⁰ This is consistent with his testimony from the 2012 hearing in which he stated that he was more than capable of going to work for an employer such as Wal-Mart or Home Depot and earning \$15 per hour. Yet at the time he chose not to work, and to rely instead on his retirement account to support himself and to pay child support. He claimed that income derived from a \$15 per hour job would not even pay his bills. From his statement, it is clear that Mr. T’s position on getting a job that pays \$15 per hour is the same

⁷ Exh. 8.

⁸ Shared custody was established during the parties’ 2012 establishment hearing. *See In the Matter of Mark J. T*, OAH No. 11-0460-CSS (Commissioner of Revenue 2012). Neither objected to that characterization in the 2014 hearing.

⁹ *Id.*

¹⁰ T hearing testimony.

today as it was two years ago. Basically, he can't be bothered with it. Thus, Mr. T remains voluntarily unemployed.

In 2012, the retirement deduction that Mr. T took from his retirement account on an annual basis was the measure of his annual income for child support purposes. That figure was \$50,000, and when the PFD was added and shared custody taken into account, his child support obligation was calculated at \$966 per month for two children.¹¹

III. Discussion

Ms. Q is appealing CSSD's determination that Mr. T's income earning potential is \$15 per hour. She remains convinced that he voluntarily quit his job working in the fiber optics field, and thus reduced his income, in order to avoid paying child support. In response, Mr. T admits that he quit his job years ago, but he denies that it was to avoid his support obligation for K and B.

There is essentially no dispute in this appeal that Mr. T is voluntarily unemployed. He acknowledged as much in the hearing. Thus, since his ability to pay child support was established in 2012, the issue in this appeal is whether his child support obligation should be modified.

Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹² Ms. Q claims, in essence, that there is not good cause or a material change in circumstances sufficient to modify Mr. T's child support. He is in the same position as he was in 2012 – voluntarily unemployed¹³ and not making serious attempts to find employment. Mr. T would argue that the exhaustion of his 401(k) constitutes a material change in circumstances. However, the balance in his retirement account has been totally within Mr. T's control. Had he gone to work, even at \$15 per hour, he would not have needed to withdraw as much money per year as he has from the account. Because the status of his 401(k) is determined by his work status, which he has the ability to control, Mr. T may not claim that the lack of funds in his retirement account constitutes a material change in circumstances sufficient to modify his child support obligation.

¹¹ See *In the Matter of Mark J. T.*, OAH No. 11-0460-CSS (Commissioner of Revenue 2012).

¹² AS 25.27.190(e).

¹³ The law has changed somewhat since the 2012 child support decision was issued in Mr. T's case – the obligor parent must be "voluntarily and unreasonably unemployed or underemployed." See Civil Rule 90.3(a)(4). Mr. T's situation meets this expanded definition.

As the person who filed the appeal, Ms. Q has the burden of proving that CSSD's order was incorrect.¹⁴ She must prove by a preponderance of the evidence that the Modified Administrative Child Support and Medical Support Order dated May 7, 2014 is incorrect.

Based on the evidence as a whole, Ms. Q has met her burden of proof. There is insufficient evidence in the record to establish that there is good cause and a material change in circumstances for Mr. T. Thus, his child support obligation should remain unchanged. Upon obtaining employment adequate to show his actual annual income, Mr. T may, of course, request another modification review.

IV. Conclusion

Ms. Q met her burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. This case does not present good cause and a material change in circumstances. Mr. T's child support should remain at \$966 per month, as set in 2012. CSSD's modification order should be vacated.

V. Child Support Order

1. The Modified Administrative Child Support and Medical Support Order dated May 7, 2014 in Mr. T's case is vacated;
2. Mr. T remains liable for child support for K and B in the amount of \$966 per month.

DATED this 16th day of July, 2014.

Signed _____
Kay L. Howard
Administrative Law Judge

¹⁴ 15 AAC 05.030(h).

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 4th day of August, 2014.

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

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