

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

In the Matter of:)
)
S T. O) OAH No. 14-1072-CSS
) CSSD No. 001060565
_____)

DECISION AND ORDER

I. Introduction

S T. O filed an appeal of a Modified Administrative Child Support and Medical Support Order the Child Support Services Division (CSSD) issued on June 10, 2014. The obligee child is T, 18 years of age. The custodial parent is D D. J.

The formal hearing was held on July 21, 2014. Mr. O appeared by telephone. Ms. J could not be reached and thus did not participate. James Pendergraft, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record as a whole and after careful consideration, CSSD's Modified Administrative Child Support and Medical Support Order is vacated. Mr. O met his burden of proving the order is incorrect because he no longer earns the income he received in 2013. He is currently unemployed, but this does not appear to be anything other than a temporary circumstance, so his child support should not be reduced, either. Rather, it should remain at the previous amount of \$490 per month.

II. Facts

A. Procedural History

Mr. O's child support obligation for T was set at \$490 per month in August 2008. On May 7, 2014, Mr. O requested a modification review and on May 15, 2014, CSSD notified both parties of the petition for modification.¹ On June 10, 2014, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified his child support to \$656 per month, effective June 1, 2014.² He appealed on June 23, 2014, asserting he has a wife and four children in the home to support, and his mortgage is \$2,200 per month.³

B. Material Facts

Mr. O and Ms. J are the parents of T, who is currently 18 years old. Post-majority support is in effect in this case until T's 19th birthday. T lives full-time with his mother.

¹ Exhs. 1-2.

² Exh. 4.

Mr. O previously worked for the State of Alaska in the field of airport maintenance. After about eight years on the job he was terminated in April 2014 because of an argument with a coworker in which Mr. O was alleged to have pushed the other person. Since then, he has looked for work in construction, at airports, online, and the North Slope. His union gave him a referral to a job as a construction flagger, but he turned it down for the reason that he has diabetes and would not be able to go to the restroom as often as is necessary. He admitted he had just assumed he would not be able to perform that job and did not make any inquiries about it before rejecting the referral. The union referred him to another job, this time at the airport in No Name. He had just completed the application before the hearing and was waiting to hear from the potential employer.

Mr. O earned \$42,062.94 in 2011; \$49,572.85 in 2012; and \$50,656.71 in 2013.⁴ He worked the entire first quarter of 2014 before being terminated, earning \$14,892.46.⁵ He began receiving unemployment benefits after leaving his employment with the State.

When asked how he had supported himself and his family, Mr. O indicated that in addition to his unemployment benefits, his wife is employed as a mental health specialist and earns \$18 per hour. He also stated that upon being terminated from his employment, he withdrew his deferred compensation of \$2,600, after taxes, and the total of his supplemental benefits account (SBS), which was approximately \$50,000. Mr. O said he spent the money on bills and paying the mortgage. Also, he sends money on a monthly basis to his 90-year-old mother, who lives in the Philippines. She is on dialysis and has to go to the hospital regularly, but she does not have any insurance.

Mr. O provided a list of his monthly expenses.⁶ Other than the mortgage of \$2,265 and the payments on two vehicles totaling \$860 that were purchased in 2013, the family's expenses to not appear to be unusually high.

III. Discussion

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”⁷ A modification is effective beginning the first of the next month after

³ Exh. 5.
⁴ Exh. 6 at pg. 1.
⁵ *Id.*
⁶ Exh. 8.
⁷ AS 25.27.190(e).

CSSD issues a notice to the parties that a modification has been requested.⁸ In this case, the notice was issued on May 15, 2014, so a modification would be effective as of June 1, 2014.⁹ In a child support matter, the person who files the appeal has the burden of proving that CSSD's order was incorrect.¹⁰ Mr. O filed the appeal, so he must prove by a preponderance of the evidence that the Modified Administrative Child Support and Medical Support Order that increased his child support to \$656 per month is incorrect.¹¹

A. Total Income from all Sources

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. Mr. O received a total of \$53,761.97 in 2013.¹² A child support calculation based on this total 2013 income is \$656 per month, as calculated by CSSD.¹³ However, Mr. O is no longer earning that income figure, and has not been since his dismissal in early April 2014. If only his first quarter 2014 wages and unemployment benefits were used as his total income, the calculation would be significantly lower. Given that he is now unemployed, it is not reasonable to use either income scenario to calculate Mr. O's child support amount. Alaska law directs the tribunal to make a determination of the parent's support obligation based on "the income which will be earned when the support is to be paid."¹⁴ For this modification, that time period is after the effective date of June 1, 2014, when he had already been unemployed for two months. The problem is that Mr. O has not proven what his total 2014 income likely will be. True, he has been receiving unemployment benefits, but those funds are by their nature temporary, and do not actually represent Mr. O's annual income.

Without more information, it is more likely than not that Mr. O's unemployment status is a temporary circumstance. He may lack the ability to pay the total child support amount every month and thus he may incur additional arrears, but there is no evidence that Mr. O is permanently unemployed. The Alaska Supreme Court has stated that unemployment is generally considered to be a temporary circumstance that should not result in the reduction of an obligor

⁸ 15 AAC 125.321(d).

⁹ Exh. 2.

¹⁰ 15 AAC 05.030(h).

¹¹ 2 AAC 64.290(e).

¹² Exh. 4 at pgs. 5-6.

¹³ Exh. 4 at pg. 6.

¹⁴ Civil Rule 90.3, Commentary III.E.

parent's child support.¹⁵ Prior decisions from the Office of Administrative Hearings follow this approach,¹⁶ and there is no reason not to follow that same approach in this case. Mr. O's child support should not be modified until he has secured employment and is earning a consistent income figure.

B. Financial Hardship

Mr. O's other appeal issue is that he cannot afford the child support amount calculated by CSSD. 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."¹⁷

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).¹⁸

The establishment of this child support order has undoubtedly created financial stress for Mr. O, but his duty to his older biological child takes priority over other debts and obligations, including additional children, he may have assumed later.¹⁹ T is entitled to receive child support in an amount based on Mr. O's ability to pay, as calculated pursuant to Civil Rule 90.3. That obligation has been correctly determined under the rule, and there is no evidence in the record that shows there is "good cause" to reduce Mr. O's obligation.

IV. Conclusion

Mr. O met his burden of proving by a preponderance of the evidence that the Modified Administrative Child Support and Medical Support Order dated June 10, 2014 is incorrect because he is no longer earning the income he received in 2013. He is currently unemployed and his annual income cannot be determined at this time. Mr. O appears only to be temporarily unemployed, so his child support should not be reduced. The order modifying his child support to \$656 per month should be vacated and his child support should remain at \$490 per month.

¹⁵ *Patch v. Patch*, 760 P.2d 526 (Alaska 1988).

¹⁶ *See In The Matter Of M.J.V.*, OAH Case No. 09-0181-CSS.

¹⁷ Civil Rule 90.3(c).

¹⁸ *See* Civil Rule 90.3, Commentary VI.E.1. Ms. J has not appeared or otherwise participated, so virtually nothing is known about her situation.

¹⁹ *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

Mr. O did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 for T were not reduced, so there is no variation under Civil Rule 90.3(c).

V. Child Support Order

- The Modified Administrative Child Support and Medical Support Order dated June 10, 2014 is vacated;
- Mr. O's child support for T shall remain at \$490 per month.

DATED this 6th day of October, 2014.

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 24th day of October, 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.]