

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

In the Matter of)	
)	
K N)	OAH No. 16-1238-CSS
<hr style="width:45%; margin-left:0"/>)	Agency No. 001140731

DECISION AND ORDER

I. Introduction

K N appeals a modification of his monthly child support obligation for his daughter F, increasing his child support obligation from \$117 a month to \$308 a month. The division had no actual earnings information for Mr. N, so it based this figure on potential income from a full-time minimum wage job. Mr. N appealed.

Because Mr. N is not voluntarily and unreasonably unemployed or underemployed, the calculation of his child support obligation should be based on what he is likely to earn, rather than his “potential income.” Mr. N is employed at minimum wage, but less than full-time. Based on the current hours and earnings reported by Mr. N at the hearing, his child support obligation should be set at \$254.

II. Facts

Mr. N’s child support obligation was set at \$116 a month in 2007 following an administrative hearing.¹ In August 2016, the custodial parent requested a modification review.² The division requested income information from both parents. Neither parent provided income information.³ The division imputed annual wages for Mr. N based on employment of 40 hours a week, 52 weeks a year at minimum wage.⁴ Based on this, it increased his support obligation for F to \$308 a month.

Mr. N appealed, arguing that he was unable to work full-time and had been unable to find a job due to a mental health condition.⁵ At the time he appealed, he was unemployed and working with the Division of Vocational Rehabilitation on getting back into the workforce.⁶ At

¹ Exhibit 1.
² Exhibit 2 at 1.
³ Position Statement at 1.
⁴ Exhibit 4 at 7.
⁵ Exhibit 5.
⁶ Exhibit 5.

the hearing he testified that he had been diagnosed as bipolar, and that a year earlier he had been homeless and living in his truck. He also reported that had just gotten a temporary minimum wage job for 32 hours a week that would last until Christmas. He stated that he had applied for social security disability payments.⁷

A telephonic hearing was convened on November 21, 2016. Mr. N represented himself. Brandi Estes, Child Support Specialist, represented the division. The custodial parent, D Z, participated. The record was held open to enable Mr. N to submit evidence of his mental health diagnosis and its effect on his ability to work. Mr. N did not submit additional evidence. The record closed on December 9, 2016.

III. Discussion

In this case, the division projected Mr. N's future income based on the assumption that he could be working 40 hours a week at minimum wage. The question on appeal is whether the division's calculation was correct. Mr. N argues that it was not, because it was not based on actual earnings. Because Mr. N requested the hearing, he has the burden of proving that the division's calculations were incorrect.⁸

A. Was Mr. N voluntarily and unreasonably unemployed or underemployed?

If the division finds that a parent is voluntarily and unreasonably underemployed or unemployed, then the division will base its child support calculations on that person's "potential income."⁹ Specifically, the division is to determine a person's potential income "by considering, based on available information, the parents' past income, skills, work history, and education, and job opportunities in the area where the parent physically resides."¹⁰ However, at the hearing, the division stated that it had stopped short of finding that Mr. N was voluntarily and unreasonably unemployed or underemployed. Unless Mr. N was voluntarily and unreasonably unemployed or underemployed, his child support obligation should be based on the best available information about his expected income, not his "potential income."¹¹

In his appeal, Mr. N wrote that he was working with the Division of Vocational Rehabilitation Services on finding work. At the hearing, he testified that he had just finished orientation for a new job. The new job was a temporary position at 30 hours a week paying

⁷ Testimony of N.

⁸ 15 AAC 05.030(h).

⁹ 15 AAC 125.060(a).

¹⁰ 15 AAC 125.020(b).

¹¹ 15 AAC 125.050(c).

minimum wage, expected to last until the Christmas holiday. Mr. N testified that he had been experiencing mental health issues and was doing his best to get back into the workforce. He also said that while he is employed at his temporary part-time job, he will be working towards finding better employment. There was no testimony at the hearing suggesting that Mr. N had been offered full time employment, or even that full-time employment at minimum wage in No Name City was available for a person with no recent recorded job experience. Mr. N's testimony about his effort to get back into the workforce was credible.

By working with the Division of Vocational Rehabilitation and then actually getting a job, Mr. N showed that he was not voluntarily and unreasonably unemployed or underemployed. Therefore, Mr. N's child support obligation should be based on what he is likely to earn, not his "potential income."

B. What is the total annual income Mr. N is likely to receive?

In cases where the agency has not determined that a person is voluntarily and unreasonably underemployed or unemployed, the division bases its calculations on "total annual income that the parent is likely to earn or receive when the child support is to be paid." This requires consideration of the best available information, including:

- (1) the parent's current income as of the date of the agency's calculation of support, as reflected in recent pay stubs or other information from the parent or the parent's employer;
- (2) the parent's actual income during the immediately preceding calendar year or, if the parent's income is erratic or information is not available for the immediately preceding calendar year, the parent's actual income during prior calendar years;
- (3) partial wage information for periods of less than one year;
- (4) the parent's wage rate at a previous job;
- (5) the parent's job skills, training, work history, and education;
- (6) the average wage or salary available to a person in the parent's particular profession or occupation and, if applicable, location;
- (7) the availability of employment in the area where the parent physically resides;
- (8) the minimum wage for the area in which the parent physically resides; and
- (9) any physical or other restrictions on the parent's ability to work.¹²

Because Mr. N was not voluntarily and unreasonably unemployed or underemployed, his child support obligation should be based on the income that he is likely to actually receive, considering the above factors.

¹² 15 AAC 125.050(c).

In this case, the division had very little information to work with when it made its calculations. Mr. N did not provide any information about his current income or his income in the past few calendar years. The division checked the records of the Alaska Department of Labor and Workforce Development and the last reported earnings for Mr. N were in 2007.¹³ The division had the facts established in the 2007 decision and order, but those are of little relevance to Mr. N's current circumstances.¹⁴ It is not clear from the record how Mr. N has been subsisting since the 2007 order. Following the hearing, the division submitted information obtained by the Department of Health and Social Services' Division of Public Assistance in the course of a food stamp review indicating that as of October there was "no income found no income reported" for Mr. N.¹⁵ That record indicated that he was receiving food stamps, low income housing assistance, and Medicaid. It also confirmed that Mr. N has applied to the Social Security Administration for disability benefits.

It is not clear whether Mr. N has a mental health condition that restricts his ability to work. In his appeal, Mr. N argued that he had been unable to find work due to his condition.¹⁶ At the hearing, he explained that he had bipolar disorder. His testimony was credible. However, he did not follow up with documentation from a health care provider confirming his diagnosis or its effect on his ability to work as the division requested. He did not show that his condition restricts him from working full time.

In light of all of this, the best available information for predicting what Mr. N's future earnings will be is the information he provided at the hearing about his new job, paying minimum wage for 30 hours of a work a week. In a previous child support case where the obligor was only working part-time, the department held that the division should have used part-time earnings to calculate the obligor's modified child support.¹⁷ Here, because Mr. N is now employed but is only working 30 hours a week, not 40, his modified child support should be based on his actual current wages and hours.

At the hearing, the division's representative calculated that income from the 30 hour a week minimum wage job would result in a support obligation of \$254 a month. Although it is

¹³ Statement of Estes at hearing.

¹⁴ Exhibit 1 (OAH No. 06-0766-CSS).

¹⁵ Submission to Record Exhibit 1.

¹⁶ Exhibit 5.

¹⁷ *In re H.E.U.*, OAH No. 13-1577-CSS (Dep't of Rev. 2014), available at <http://aws.state.ak.us/officeofadminhearings/Documents/CSS/CSS131577.pdf>.

possible that Mr. N will obtain a full-time, 40 hour a week job in the future, this is speculative at this point. The best available information about Mr. N's future earnings is the information he provided at the hearing about his new job for 30 hours a week at minimum wage. This indicates that Mr. N's child support obligation should be \$254 a month.

C. Hardship variance

Civil Rule 90.3(a) requires that a noncustodial parent pay 20 percent of their adjusted gross income as support for one child. Civil Rule 90.3(c) allows for variance from the usual support formula in cases where manifest injustice would result if the support award were not varied. Mr. N did not argue that he was entitled to a hardship variance, and the testimony of the parties did not indicate that a variance would be appropriate in this case. Mr. N has not demonstrated in this case that his child support obligation should be calculated under Civil Rule 90.3(c) rather than Civil Rule 90.3(a).

IV. Conclusion

Because Mr. N is not voluntarily and unreasonably unemployed or underemployed, Mr. N's child support obligation should be calculated based on his actual employment at minimum wage for 30 hours a week, rather than "potential income" of minimum wage for 40 hours a week.

If Mr. N's earnings increase or decrease significantly in the future, either parent may request another modification.

The child support amounts in this order were calculated using the primary custody formula in Civil Rule 90.3.

V. Child Support Order

1. Mr. N's ongoing child support obligation for one child is set at \$254 a month for one child.
2. All other provisions of the division's Modified Administrative Child Support and Medical Support Order dated September 28, 2016 remain in effect.

Dated: December 29, 2016.

Signed
Kathryn L. Kurtz
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 within 30 days after the date of this decision.

DATED this 13th day of January, 2017.

By: Signed
Signature
Kathryn L. Kurtz
Name
Administrative Law Judge
Title

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