

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

In the Matter of)	
)	
X F. Q III)	OAH No. 16-1518-CSS
_____)	Agency No. 001157714

DECISION AND ORDER

I. Introduction

X F. Q, III, appeals a Modified Administrative Child and Medical Support Order issued by the Child Support Services Division (CSSD) on December 6, 2016. The order modified Mr. Q's support obligation for his son, S, from \$1,193 to \$1,533 per month, effective October 1, 2016 and ongoing.

For the reasons discussed below, Mr. Q's child support amount should be adjusted to \$1,446 per month for October 2016 through December 2016, and \$1,198 per month beginning January 1, 2017 and ongoing.

II. Facts

A. Material Facts

X F. Q, III, and D S are the parents of S, who will turn 8 in 2017. Both parents live in City A. At present, Ms. S has primary physical custody of S. However, the parties have a pending case in superior court, which may result in changes to their custody and visitation arrangement.

Ms. S works seasonally on a contract basis. In 2016, she worked a very limited schedule and earned gross wages of \$3,612.50.¹ Mr. Q is licensed as a 1600-ton ocean master. In 2016 and for many preceding years, he was an employee of the U.S. Department of Interior, working as a ship operator. The job was permanent, but Mr. Q's work hours were concentrated primarily in the summer months, when he typically received overtime pay. In 2016, Mr. Q's hourly wage was \$46.49, and his base salary was \$95,689.² However, including his overtime, his 2016 gross pay totaled \$132,775.22.³

¹ Exhibit 5.

² Q submission received 1/24/2017 (Leave/Earnings Statement (LES), 12/10/2016); Exhibit 6, p. 13.

³ Q submission received 1/24/2017 (LES dated 12/10/2016).

Mr. Q is 60 years old. He is healthy and capable of continuing to work. He elected to retire from federal service, effective December 31, 2016, with 24 years of service.⁴ Beginning February 1, 2017, he will receive a monthly federal pension of \$2,179.37, or \$26,152.44 annually.⁵ In 2017, he also will receive a lump sum payment of \$18,317.06, the cash value of 394 hours of accrued annual leave at his \$46.49 hourly rate.⁶ Mr. Q has a deferred compensation savings account, known as a Thrift Savings Plan, from which he could receive additional retirement income.⁷ However, he is not required to make withdrawals from this account until age 70 1/2, and he does not plan to withdraw any funds for at least several years.

Following his retirement, Mr. Q is likely to work as a ship captain on a part-time or contractual basis. He has discussed seasonal employment with the Department of Interior and with other potential employers. He characterized these conversations as preliminary, particularly with the federal government, since federal hiring restrictions may limit his opportunities with that employer. If he works for the federal government, Mr. Q believes he would work for approximately four weeks. The work would include overtime hours. Mr. Q declined to estimate his likely income from contract work with the government.⁸

Mr. Q also could work for other employers in City A, and he has had some general discussions about doing so. However, he declined to provide any information regarding his likely wages or work schedule if he pursues these opportunities. He does not want to commit to any expectations regarding his likely income from part-time work since, at the time of the hearing, he was newly retired and wanted to reserve the option of not working at all. He asked that his support obligation for S be calculated based exclusively on his federal pension, his cashed-out leave, and his Alaska PFD.

Mr. Q's wife owns and operates a bed and breakfast business in the same home where she and Mr. Q reside. Mr. Q testified that he does not work for or earn income from the business. However, promotional materials identify him as a co-host of the operation.⁹ In addition, he authored the online advertisement for the business, which CSSD submitted after the hearing.¹⁰ Regardless whether he earns a paycheck from his wife's business, the evidence is that Mr. Q is

⁴ Exhibit 10, p. 3.

⁵ See Exhibit 10, p. 3 ($\$1,185.37 + \$994 = \$2,179.37$).

⁶ Q submission received 1/24/2017 (LES dated 12/10/2016).

⁷ Q testimony. The value of these savings is not in the record.

⁸ Mr. Q argued that he could be hired at an entry-level pay range of \$35 per hour. He did not explain how his hours would be calculated or what gross pay he likely would earn.

⁹ Exhibit 17.

¹⁰ *Id.*

involved in supporting the business, and he benefits from it financially. For example, Mr. Q may be able to retire without drawing on his deferred compensation or other savings because his wife's income will support his current lifestyle.

B. Procedural Background

Mr. Q's support obligation for S was last reviewed in 2010. At that time, CSSD set his ongoing monthly obligation at \$1,193.¹¹ On August 26, 2016, CSSD received Ms. S's request for a modification review.¹² On September 27, 2016, CSSD served the parties with notice of the petition to modify Mr. Q's support obligation.¹³ Both parties submitted income information.¹⁴ Mr. Q also submitted information regarding the medical insurance he provides for S.¹⁵

On December 6, 2016, CSSD issued a decision granting Ms. S's request for a modification review, along with the Modified Administrative Child Support and Medical Support Order that is the subject of this appeal.¹⁶ The modified support order adjusted Mr. Q's support obligation for S to \$1,533 per month, effective October 1, 2016.

Mr. Q appealed and requested a formal hearing.¹⁷ He argued that the modified order does not reflect his actual 2016 salary, and it does not account for his significantly reduced retirement income in 2017. He also argued that he should receive a medical credit for the cost of health insurance he provides for S.¹⁸

The formal hearing took place on January 24, 2017. Mr. Q and Ms. S appeared by telephone, represented themselves and testified for themselves. Child Support Specialist Brandi Estes also appeared telephonically and represented CSSD. The hearing was recorded. The record remained open after the hearing so Mr. Q could provide additional documentation of his 2016 gross wages, and so CSSD could submit revised child support calculations. The parties were provided an opportunity to respond to those calculations. All submitted documents were admitted into the record. The record closed on February 15, 2017.

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¹¹ Exhibits 1, 2. After an administrative appeal, the agency's decision became final on 1/26/2011.

¹² Exhibit 3.

¹³ Exhibit 4.

¹⁴ Exhibits 5, 6.

¹⁵ Exhibits 7, 10, 13; Q submission received 1/5/2017 (Health Benefits History Report).

¹⁶ Exhibit 8.

¹⁷ Exhibit 9.

¹⁸ *Id.*

III. Discussion

Mr. Q filed the appeal in this matter, so he has the burden of proving by a preponderance of the evidence that CSSD's December 6, 2016 Modified Administrative Child and Medical Support Order is incorrect.¹⁹

A. Preliminary Matters

Mr. Q indicated that the parties are presently litigating custody and visitation issues in superior court. As of the time of the hearing in this appeal, Mr. Q agreed that Ms. S exercises primary physical custody. Therefore, this decision will apply the primary physical custody formula set out in Civil Rule 90.3(a).

The parties dispute whether Mr. Q should be entitled to a medical credit for the cost of medical insurance he provides for S. Mr. Q requested a credit. Ms. S argues that she already provides full medical coverage for S at no cost. Therefore, she contends that additional insurance is unnecessary, and Mr. Q should not receive a medical credit deduction.

The medical credit issue is not properly presented in this case. Pursuant to 15 AAC 125.432(g), CSSD must process Mr. Q's request administratively. Once it does, an administrative appeal is not available to review its calculation of any credit due. Instead, its final decision may be appealed directly to superior court. The CSSD hearing representative indicated that CSSD would begin the administrative process to act on Mr. Q's request.²⁰ She also advised that CSSD can administratively adjust Mr. Q's case as of the date at which CSSD or a court determines that he provided qualifying coverage.

B. Child Support Calculation

A parent is obligated both by statute and at common law to support his or her children.²¹ Civil Rule 90.3(a)(1) provides that a noncustodial parent's child support amount is to be calculated based on his or her "total income from all sources," minus specified deductions. After appropriate deductions, the resulting adjusted annual income figure is multiplied by 20% to determine the parent's annual support obligation for one child.²² The obligor-parent has the burden of proving his or her earning capacity.²³

¹⁹ 15 AAC 05.030(h).

²⁰ The hearing representative also noted that the superior court could resolve this question in the parties' pending custody matter.

²¹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

²² Civil Rule 90.3(a)(2).

²³ *Kowalski*, 806 P.2d at 1372.

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”²⁴ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes a “material change in circumstances” has been established and the order should be modified. A modification is effective beginning the month after the parties are served with notice that a modification has been requested.²⁵ In this case, CSSD provided the parties with notice of the petition for a modification in September 2016; therefore, any modification is effective as of October 1, 2016.

1. 2016 Income Determination

For 2016, Mr. Q’s total income from all sources can be calculated from his actual income. Based on his final 2016 paystub, Mr. Q earned 2016 wages of \$132,775.22. He also received a 2016 PFD payment of \$1,022. After deductions for federal income taxes, Social Security/Medicare, unemployment insurance, and Mr. Q’s payments into a tax-deferred retirement account, his resulting adjusted annual income is \$86,766.34.²⁶

This income results in a child support calculation of \$1,446 per month for one child.²⁷ This sum is more than a 15% change from Mr. Q’s prior \$1,193 support obligation. Therefore, his obligation for S should be adjusted to \$1,446 for the months of October through December 2016.

2. 2017 Income Determination

The analysis regarding Mr. Q’s expected 2017 income is more challenging, because Mr. Q is newly retired and uncommitted to future employment. Nonetheless, Civil Rule 90.3 requires a determination of his anticipated income over the course of the full year.²⁸ The rule recognizes that this determination is necessarily somewhat speculative, because the relevant income figure is expected future income.²⁹ It asks for a review of all available evidence to make the best possible calculation.

Mr. Q asserts that, at age 60, he should be entitled to retire without any expectation that he will earn additional income. He therefore requests that his 2017 child support amount be calculated based only on his known sources of 2017 income: his federal pension, his cashed-out

²⁴ AS 25.27.190(e).

²⁵ 15 AAC 125.321(d).

²⁶ See Exhibit 15. Under Civil Rule 90.3(a)(1)(B), the deduction for Mr. Q’s contributions to his retirement account may not exceed 7.5% of his gross wages. Therefore, although Mr. Q may have contributed more than 7.5% of his pay to this account, the calculation provides for a deduction based on the 7.5% limit.

²⁷ Exhibit 15.

²⁸ Civil Rule 90.3, Commentary III.E.

²⁹ *Id.*

accrued leave, and his 2017 PFD payment. These sources of income total \$45,491.50.³⁰ However, given Mr. Q's good health, significant earning history, available employment opportunities, and quite young child, this argument is unpersuasive.³¹

Ms. S argues that Mr. Q's 2016 support obligation should remain in place for 2017 and ongoing, because he voluntarily and unreasonably decided to retire at age 60. She notes that Mr. Q is healthy, and he was not forced to leave federal employment. He chose retirement as a lifestyle choice, which she argues is unreasonable for a healthy 60-year-old with a young child.

The Alaska Supreme Court has stated that a noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in her or her child support obligation.³² In *Pattee v. Pattee*, the Court recognized that an obligor-parent should not be locked into a particular job, particularly if a lower-paying position may ultimately result in personal or professional advancement. At the same time, however, the custodial parent and minor child should not be forced to finance the noncustodial parent's career change or lifestyle choice.³³ The tribunal is therefore to consider the nature and reasons for the changes and determine whether, under all the circumstances, a modification of child support is warranted.³⁴

When a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated based on the parent's potential income. This can be determined based on the parent's "work history, qualifications and job opportunities."³⁵ It is not necessary to prove that a noncustodial parent is purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to that parent.³⁶ The Alaska Supreme Court has explained that "the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning."³⁷ The key question in this analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal

³⁰ \$26,152.44 pension + \$18,317.06 leave + \$1,022 PFD = \$45,491.50.

³¹ Mr. Q's argument also is weakened by his evident efforts to reduce his expected income to a bare minimum, in order to minimize his child support obligation. Indeed, if Mr. Q's position was accepted, he could request another modification review in 2018, when his two known sources of income will be his pension and the PFD, which total only \$27,174.44.

³² *Pattee v. Pattee*, 744 P.2d 658,662 (Alaska 1987), *overruled on other grounds in Nass v. Seaton*, 904 P.2d 412 (Alaska 1995).

³³ *Id.*; *see also Nass v. Seaton*, 904 P.2d 412 (Alaska 1995).

³⁴ *Pattee*, 744 P.2d at 662. *See also Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997); Civil Rule 90.3, Commentary III.C (totality of the circumstances required in deciding whether to impute income).

³⁵ Civil Rule 90.3(a)(4); 15 AAC 125.060.

³⁶ *See Kowalski v. Kowalski*, 806 P.2d 1368, 1370-71 (Alaska 1991).

³⁷ *Beaudoin v. Beaudoin*, 24 P.3d 523, 528 (Alaska 2001).

choices."³⁸

In this case, there is no dispute that Mr. Q is voluntarily unemployed, since he is healthy and he faced no pressure or expectation of retirement when he turned 60. Based on the totality of the evidence, Mr. Q's purely personal choice to retire – and his decision to reject any commitment to earning other income while retired - is also unreasonable. Mr. Q does not have any medical or other limitations that make continued employment difficult, and his decision to retire is accurately described as a lifestyle choice.³⁹ However, it is not reasonable to so drastically reduce his income, given his demonstrated ability to earn and the needs of his young son.

As evidenced by his professional license and work history, Mr. Q is highly skilled and experienced in his field. Even assuming he could not return to his former full-time employment with the federal government, he remains capable of earning significant income. Jobs in his field remain available, and he has discussed work with several potential employers. Based on the evidence in the record, he can and likely will earn post-retirement income as a boat captain. The likely amount of this income is not in the record because Mr. Q would not provide it.

Based on the evidence that is in the record, Mr. Q's base salary from his prior employment offers the most reasonable estimate of his potential income. This amount, \$95,689, therefore should be imputed to him as a reasonable expectation of his income in 2017 and ongoing. Mr. Q's potential income of \$95,689, plus the 2017 PFD, result in total expected income of \$96,711. After allowable deductions for federal taxes, Social Security/Medicare, and unemployment insurance, this income results in a monthly support amount of \$1,198 for S, effective January 1, 2017 and ongoing.⁴⁰

IV. Conclusion

Mr. Q met his burden to show that the December 6, 2016 Modified Administrative Child and Medical Support Order was incorrect. Based on the information provided through the hearing process, his child support obligation for S should be adjusted to \$1,446 per month for the months of October, November and December 2016. Because Mr. Q is voluntarily and unreasonably unemployed following his January 1, 2017 retirement, his 2017 and ongoing support obligation should be based on imputed income equal to his former base salary, plus the PFD. This amount

³⁸ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997); *see also Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

³⁹ *Cf. Maloney v. Maloney*, 969 P.2d 1148 (Alaska 1998) (voluntarily early retirement from the military was reasonable, given likelihood of involuntary discharge and ensuing disadvantage in the civilian job market).

⁴⁰ *See* Attachment A (child support calculation from <https://webapp.state.ak.us/cssd/guidelinecalc/form>).

results in an ongoing obligation of \$1,198 per month. No variance under Civil Rule 90.3(c) was requested or granted.

V. Child Support Order

- Mr. Q is liable for child support for S in the amount of \$1,446 per month for October through December 2016, and \$1,198 per month beginning January 2017 and ongoing;
- All other provisions of the Modified Administrative Child and Medical Support Order dated December 6, 2016 remain in full force and effect.

DATED: March 7, 2017.

By: Signed
Kathryn Swiderski
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 31st day of March, 2017.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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