

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

In the Matter of)	
)	
M A. D)	OAH No. 17-0190-CSS
_____)	Agency No. 001140808

DECISION AND ORDER

I. Introduction

Custodial parent B H appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on January 31, 2017. The order modified M D’s support obligation for his daughter, J, from \$1,023 to \$448 per month, effective November 1, 2016.

Based on the evidence in the record and after careful consideration, Mr. D’s child support amount should be adjusted to \$741 per month, effective November 1, 2016.

II. Facts

A. Material Facts

Mr. D and Ms. H are the parents of J, who is 12. J lives with Ms. H in Alaska. Mr. D lives in the Washington D.C. area.

Mr. D is 42 years old. He has not been employed since September 1, 2016, when he retired from the U.S. Air Force, although he is looking for work. Mr. D is married, and his wife is employed. He has one child who is older than J, but that child is at least 18 years old. Therefore, he no longer has an ongoing support obligation for any children older than J.

Prior to his retirement, Mr. D spent 24 years in the U.S. Air Force, where he worked in an administrative capacity.¹ He retired at the rank of master sergeant. He did not leave the military by choice. At his rank and years of service, Mr. D had no option to remain in the military unless he received a promotion, which did not materialize.

Mr. D began searching for post-military employment several months before he retired. Since he retired, Mr. D asserted that he has actively looked for new employment, so far without success. He graduated from college with a degree in information technology management. However, in his military career, he did not work in that field. He has focused his job search on administrative positions in areas such as program management, records management, and

¹ Mr. D did not explain his administrative duties with any specificity.

administrative assistant work. He initially sought jobs offering a yearly salary of approximately \$85,000. As time has worn on, he has lowered the salary range. Most recently, he applied for jobs in the \$40,000 to \$45,000 range.

Mr. D agreed that there are plenty of administrative jobs available in the Washington D.C. area. To date, he simply has not secured one of them. At the time of the hearing, he had not broadened his search to include work at a lower salary range, or work outside the administrative field. He agreed that he could do so, and he is capable of working an hourly job as an interim measure.

In 2015, Mr. D's gross income totaled \$86,549, including his military allowances for matters such as housing, subsistence and cost-of-living.² In 2016, his gross income was \$58,627.³ This includes active duty wages and other allowances through August 2016 and his pension income for the rest of the year. At present, Mr. D's only income is his monthly military pension of \$2,439.⁴

B. Procedural Background

Mr. D's support obligation for J was last reviewed in 2010. At that time, CSSD set his ongoing monthly obligation at \$1,023, based on Mr. D's total gross income of \$78,578.88.⁵ This income included active duty pay of \$41,227.20, plus military allowances and cost-of-living adjustments of \$37,351.68. At that time, Mr. D also received deductions from income for child support he paid for his older child and for contributions to a retirement savings plan.⁶

In October 2016, CSSD received Mr. D's request for a modification review.⁷ On October 31, 2016, it served the parties with notice of the petition.⁸ On January 31, 2017, CSSD issued the Modified Administrative Child Support and Medical Support Order that is the subject of this appeal.⁹ The modified order set Mr. D's obligation at \$448 per month, effective November 1, 2016, based solely on Mr. D's military pension income.

² See Exhibit 11.

³ Exhibit 9.

⁴ Exhibit 2, p. 5; Exhibit 5.

⁵ Exhibit 1.

⁶ See Exhibit 1, p. 6.

⁷ Exhibit 2.

⁸ Exhibit 3.

⁹ Exhibit 7.

Ms. H appealed.¹⁰ She argued that the modification was based on incomplete income information. Alternatively, she argued that Mr. D is voluntarily and unreasonably unemployed or underemployed.

The formal hearing took place on April 13, 2017. Mr. D and Ms. H appeared by telephone, represented themselves and testified for themselves. Child Support Specialist Joseph West also appeared telephonically and represented CSSD. The hearing was recorded. The record remained open after the hearing so CSSD could submit a revised child support calculation. Its post-hearing submission concluded that Mr. D's child support should be set based on his pension income, plus income from either a full- or part-time job at Maryland's minimum wage of \$8.25 per hour.¹¹ This would result in a support obligation of \$620 per month, if part-time employment, or \$741 per month at full-time employment. Both parties submitted written responses to CSSD's proposed calculations. All submissions were admitted into the record. The record closed on April 25, 2017.

III. Discussion

Ms. H filed the appeal in this matter, so she has the burden of proving by a preponderance of the evidence that CSSD made a mistake when it issued the January 31, 2017 Modified Administrative Child Support and Medical Support Order.¹² She met that burden by showing that CSSD incorrectly based the modification solely on Mr. D's pension income.

A. Modification standards and effective date

Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹³ 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. In this case, a material change is established if the new calculation changes Mr. D's support amount by more than \$153.45.¹⁴

A modification is effective beginning the month after the parties are served with notice that a modification has been requested.¹⁵ CSSD provided the parties in this matter with notice of the petition for a modification in October 2016. Therefore, the modification is effective as of November 1, 2016.

¹⁰ Exhibit 8.

¹¹ CSSD submission dated 4/17/17.

¹² 15 AAC 05.030(h).

¹³ AS 25.27.190(e).

¹⁴ $\$1,023 \times 15\% = \153.45 .

¹⁵ 15 AAC 125.321(d).

B. Income Determination

A parent is obligated both by statute and at common law to support his or her children.¹⁶ Alaska Civil Rule 90.3(a) provides the formula used to calculate child support awards in cases where one parent has primary physical custody. 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. In determining total income from all sources, Civil Rule 90.3 requires an assessment of the amount the parent can be expected to earn during the period for which the support is being paid. The obligor-parent has the burden of proving his or her earning capacity.¹⁷

Since September 2016, Mr. D's \$2,439 monthly pension has been his only source of income. Based on the evidence in the record, CSSD's modification incorrectly assumed that this sum will continue to be his sole source of income. At 42, Mr. D is still capable of earning significant income, and his young daughter is entitled to his financial support. Given his earning history, it is not reasonable for him to expect a child support calculation based solely on his reduced retirement income. During the hearing, Mr. D agreed that he will work again, and he insisted that his ongoing job search is both active and diligent. However, he also cast doubt on these statements by expressing significant ambivalence about working, repeatedly questioning why he shouldn't be allowed to fully retire after 24 years in the military.¹⁸

When a parent is changing jobs or transitioning from one career to another, as Mr. D is, the relevant inquiry considers the nature of the changes and the reasons for the changes, and then determines whether, under all the circumstances, a modification is warranted.¹⁹

A parent's lack of employment may initially be explained by circumstances such as an involuntary change of career. However, at some point, continuing unemployment becomes unreasonable. Such situations raise the issue of voluntary and unreasonable unemployment.

If a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated from that parent's "potential income," which is

¹⁶ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁷ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991). In primary custody cases, the law presumes that the custodial parent is meeting his or her child support obligations. Absent unusual circumstances, that parent's income is not a factor in determining the noncustodial parent's obligations under Civil Rule 90.3.

¹⁸ D testimony and post-hearing submission. Mr. D also argued that a child support calculation based only on his retirement income sufficiently provides for J's needs. D post-hearing submission. It is not at all clear that this is true. Regardless, the law requires a different analysis.

¹⁹ *Pattee v. Pattee*, 744 P.2d 658 (Alaska 1987).

based on his or her “work history, qualifications and job opportunities.”²⁰ 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.”²¹ It is not necessary to prove the individual is acting in bad faith or purposefully avoiding a child support obligation before imputing income.²² The totality of the circumstances is to be considered.²³

In this case, Mr. D did not leave the military voluntarily. He retired because he knew a discharge would be forthcoming. Therefore, his initial unemployment status was neither voluntary nor unreasonable. However, the hearing in this matter took place nearly eight months after Mr. D left the military and more than ten months after he started searching for new employment, in a metropolitan area where many jobs are available. This suggests that Mr. D’s unemployment is more likely than not the result of a voluntary and unreasonable lifestyle choice. His current situation and earnings reflect a voluntary and unreasonable decision to earn less than he is capable of earning.²⁴ As Mr. D acknowledged, even if he ultimately hopes to find a higher-paying permanent position, he could take an interim job to bridge his income while he establishes his civilian career.

At a bare minimum, while he continues to seek more suitable employment, Mr. D should be able to find full-time employment paying minimum wage. In Maryland, such work would result in annual gross wages of \$17,160.²⁵ Including Mr. D’s pension income, his annual gross income would total \$46,428, which results in a child support obligation of \$741 per month for one child, effective November 1, 2016 and ongoing.²⁶ If Mr. D’s income materially changes, any party may request another modification review.²⁷

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²⁰ Civil Rule 90.3(a)(4).

²¹ *Beaudoin v. Beaudoin*, 24 P.3d 523, 528 (Alaska 2001).

²² *Kowalski*, 806 P.2d, 1368, 1371 (Alaska 1991).

²³ Civil Rule 90.3, Commentary III.C.

²⁴ An alternative view would be that Mr. D is experiencing temporary unemployment as he transitions to a civilian career. In that analysis, it would be appropriate to calculate his child support obligation based on his annual base salary as of his retirement date. That figure is not in the record, however.

²⁵ 2080 hours x \$8.25/hour = \$17,160.

²⁶ See CSSD calculation dated 4/17/17. This income likely remains in the general range of Mr. D’s pre-retirement military base pay. Cf. Exhibit 1, p. 6. It also accounts for the fact that his future employment will no longer include military pay adjustments for cost-of-living or other allowances.

²⁷ During the hearing, Mr. D agreed to notify CSSD when he obtains new employment.

IV. Conclusion

Ms. H met her burden to show that the January 31, 2017 Modified Administrative Child Support and Medical Support Order was incorrect. Based on the information provided during the hearing process, Mr. D is voluntarily and unreasonably unemployed. Therefore, his child support obligation for J should be based on his pension income plus potential income from a full-time, minimum wage job. This income results in a child support amount of \$741 per month. No variance under Civil Rule 90.3(c) was requested or granted.

Mr. D hopes to find a higher-paying long-term position in the future. His support obligation can be reviewed again when his financial circumstances materially change.

V. Child Support Order

- Mr. D is liable for child support for J in the amount of \$741 per month, effective November 1, 2016 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated January 31, 2017 remain in full force and effect.

DATED: May 1, 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 19th day of May, 2017.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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