

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

In the Matter of)	
)	
B M. N)	OAH No. 17-0337-CSS
<hr style="width:40%; margin-left:0;"/>)	Agency No. 001217295

DECISION AND ORDER

I. Introduction

B N appeals an Administrative Review Hearing Decision and Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on February 27, 2017. CSSD determined that Mr. N is voluntarily and unreasonably unemployed, and it set his 2017 and ongoing child support amount based on potential income from a full-time, minimum wage job. That income resulted in a \$309 per month support obligation for Mr. N’s daughter, Z.

Based on the record and after careful consideration, Mr. N did not meet his burden to show that CSSD made a mistake when it determined that he is voluntarily and unreasonably unemployed, or when it imputed income to him based on full-time, minimum wage employment. The Amended Administrative Child Support and Medical Support Order is therefore affirmed.

II. Facts

A. Material Facts

B N and custodial parent S A are the parents of one child, Z, age 8. Z lives with Ms. A on the No Name. Mr. N lives in No Name City. The parties are in the midst of custody proceedings to clarify their custody and visitation schedule. At present, Ms. A exercises primary physical custody.

Mr. N is 50 years old. Z is his only child. Mr. N lives alone in a home he owns. He does not have any recent history of reported wage income. He indicated that he is unemployed, and he did not earn any significant income in 2016 or to-date in 2017. He sometimes does odd jobs for friends, for instance snow removal or yard work, but he declined to provide any detailed information about the frequency or extent of this work, for which he is paid in cash. He stated that he is typically paid about \$20 per job. He would not offer any estimate of his total income

from doing odd jobs. To pay his living expenses, Mr. N indicated that he is living off his savings, and he has been selling personal property to make ends meet.

In general, Mr. N's testimony about his income was too vague and evasive to be reliable. His assertion that he typically works for \$20 per job is not credible, given his apparent lack of other income.

Prior to 2016, Mr. N was self-employed seasonally as a hunting guide and an aircraft mechanic. He was licensed as a guide from approximately 1991 to 2015, when his license expired. He has not renewed the license for several reasons, including his age, recent medical problems, and his feelings about changes in the guide industry. He was never certified as an aircraft mechanic. At the administrative review hearing in February 2017, he indicated that he earned \$22 per hour when he worked on aircraft, and at least \$250 per day when he was guiding.¹ Mr. N's 2015 federal tax return identifies gross receipts of \$9,321 from his work as a guide and aircraft mechanic, and a \$7,955 profit after deduction of business expenses.²

In the spring of 2016, Mr. N had a hernia repair that restricted him from any lifting for two weeks after the surgery, and it limited him to lifting no more than 30 pounds for another month after that. His doctor released him for all normal activities in May 2016, but he advised that a second inguinal hernia would require surgical repair in the future.³ Mr. N did not look for employment following his doctor's release back to normal activity.

Mr. N had emergency surgery to remove his appendix on February 16, 2017.⁴ His doctor wrote a letter on March 27th, stating that he had recovered from this surgery. However, the doctor noted that Mr. N will have another surgery in May 2017 to repair the remaining hernia. Until then, he is not to lift weights heavier than 50 pounds.⁵ At present, the hernia causes Mr. N regular and sometimes significant discomfort. However, his doctor has not told him that he cannot or should not work.⁶

Mr. N acknowledges that his medical situation involves a series of temporary problems rather than any permanent ones. His plans after he recovers from his May 2017 surgery are vague. He may return to school, but he would not name an area of study. He may consider job

¹ Exhibit 7, pp. 2-3.

² Exhibit 4, p. 5.

³ Exhibit 4, p. 11.

⁴ Exhibit 8, p. 2.

⁵ *Id.*

⁶ N testimony.

options, but he was unwilling to make any commitments, as he plans to re-assess his options after the surgery.

B. Procedural History

Ms. A applied for child support services for Z in September 2016.⁷ CSSD initiated a child support action against Mr. N the same month.⁸ On January 11, 2017, it served an Administrative Child Support and Medical Support Order, which set Mr. N's ongoing child support at \$172 per month, with arrears of \$50 per month for the months of September through December 2016.⁹ The ongoing support amount was based on imputed income from a part-time, minimum wage job working 20 hours per week.

Ms. A requested an administrative review.¹⁰ She asserted that Mr. N has undisclosed sources of income from working "under the table" for cash. She asserted that, despite his lack of reported income, he pays roughly \$1,200 for his monthly mortgage, plus utility bills and other expenses. This lifestyle strongly suggests additional sources of income.

An Administrative Review Hearing took place on February 13, 2017.¹¹ CSSD issued the Administrative Review Hearing Decision and Amended Administrative Child and Medical Support Order that are challenged in this appeal on February 27, 2017.¹² The amended order set Mr. N's 2017 and ongoing child support at \$309 per month, with the same arrears calculation of \$50 per month for September through December 2016.¹³ The ongoing support amount was based on CSSD's determination that Mr. N is voluntarily and unreasonably unemployed, and he is capable of earning income equal to that from a full-time, minimum wage job.

Mr. N appealed.¹⁴ He argued that the parties' custody schedule is not final, and CSSD improperly relied on his history of work as a hunting guide and aircraft mechanic to set his ongoing child support. He indicated that he currently has no sources of income, and his medical condition prevents him from working.¹⁵

⁷ Exhibit 1.

⁸ Exhibit 2.

⁹ Exhibit 5. Paternity was established by the birth certificate. Mr. N does not contest paternity.

¹⁰ Exhibit 6.

¹¹ Exhibit 7, p. 1.

¹² Exhibit 7.

¹³ Exhibit 7. The 2016 support obligation was based only on Mr. N's PFD income. This resulted in a state-minimum support amount of \$50 per month. *See id.*, pp. 11, 13. This calculation was not challenged on appeal.

¹⁴ Exhibit 8, p. 1.

¹⁵ *Id.*

III. Discussion

As the person who filed the appeal, Mr. N has the burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child and Medical Support Order is incorrect.¹⁶

A parent is obligated both by statute and at common law to support his or her children.¹⁷ When CSSD establishes a support obligation, it collects support from the date the custodial parent requested child support services, or the date public assistance or Medicaid benefits were provided on the child's behalf.¹⁸ In this case, Ms. A applied for child support services in September 2016, so that is the first month in which CSSD's child support order will assess a support obligation for Z.

A. *Preliminary matters*

The parties have a pending case in superior court to address both custody and child support issues.¹⁹ At present, Ms. A has primary physical custody, and CSSD's support order is based on that arrangement. The parties were advised to inform CSSD if their arrangement changes to shared custody. Similarly, if the superior court issues a child support order, the parties were advised that it will supersede CSSD's administrative order. Until that time, however, the administrative order will be in effect.

B. *Child support calculation*

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. N is unemployed, so he does not have an income from which to calculate a child support figure. He has experienced a series of temporary medical set-backs due to his hernia and appendix problems. However, except for some physical restrictions on lifting, he is otherwise capable of working. His lack of employment or income therefore raises the issue of voluntary and unreasonable unemployment.

If a parent is found to be voluntarily and unreasonably unemployed, his or her child support may be calculated from that parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."²⁰ In cases in which voluntary

¹⁶ 15 AAC 05.030(h).

¹⁷ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁸ 15 AAC 125.105(a)(1)-(2).

¹⁹ A testimony.

²⁰ Civil Rule 90.3(a)(4).

unemployment is alleged, the tribunal must determine whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed.”²¹ It is also necessary to determine whether the parent’s unemployment is unreasonable. An integral part of the analysis is whether the parent’s lack of employment is a result of “economic factors,” as in being laid off, or of “purely personal choices.”²² It is not necessary to prove the individual is purposefully avoiding a child support obligation, or acting in bad faith, before imputing income.²³ The totality of the circumstances is to be considered.²⁴

In its administrative review hearing decision, CSSD concluded that Mr. N’s employment history has varied from year to year, but he provided only general information about past earnings or his current earning ability.²⁵ His experience as a guide and aircraft mechanic indicates that he has significant and marketable job skills, for which he could be paid well over minimum wage. Further, his lack of employment since 2015 is not explained by his 2015 hernia surgery, since that required only temporary restrictions, and his doctor released him for normal activity in May 2015. However, Mr. N has not sought employment at any point since that time. CSSD concluded that Mr. N is voluntarily and unreasonably unemployed, and it determined that he is capable of earning income at least equal to that from a full-time, minimum wage job. Gross income from such work would total \$20,384 per year. Including the Alaska PFD, this income results in a child support obligation of \$309 for one child.²⁶

After careful consideration, this decision concludes that Mr. N did not meet his burden to show that CSSD made a mistake. Based on the evidence in the record, Mr. N is capable of earning income. For purposes of determining his 2017 and ongoing child support obligation, his lack of income is due to purely personal choices rather than any economic forces. It is clear that Mr. N faces some physical challenges. However, he has not made any effort to investigate employment that would accommodate his temporary physical limitations. Further, his evasive testimony made it impossible to ascertain what income he has actually earned in the past, and what income he could reasonably be expected to earn in the coming year. Mr. N has been self-employed and generally working for cash for many years. As a result, in combination with his vague testimony, the limited documentation showing his 2015 income is not particularly reliable.

²¹ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

²² *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²³ *Kowalski v. Kowalski*, 806 P.2d, 1368, 1371 (Alaska 1991).

²⁴ Civil Rule 90.3, Commentary III.C.

²⁵ Exhibit 7.

²⁶ *See* Exhibit 7, p. 12.

Alaska law is clear that a parent has a duty to support his or her children, and this duty takes priority over lifestyle decisions such as choosing not to work.²⁷ This is because the child should not be forced to finance the parent's choices, by foregoing support to which the child is entitled.²⁸ According to the Alaska Supreme Court, a primary goal of imputing income is to compel the parent to find employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.^[29]

If he was working, Mr. N's two surgeries in 2017 would require him to take some time off to recuperate. Based on the record, this would involve two to four weeks of rest, with additional weeks of lifting restrictions. On the other hand, Mr. N has job skills and work experience for which he could be paid significantly more than minimum wage, and he lives in an area in which jobs are available. CSSD appropriately balanced these considerations and concluded that the child support amount should be based on income from a full-time minimum wage job. Mr. N did not show that CSSD more likely than not made a mistake in this assessment. As a result, the February 27, 2017 Amended Administrative Child Support Order is affirmed. Mr. N's 2017 and ongoing support for Z is \$309 per month. If Mr. N's circumstances materially change, and he is willing to provide more detailed information about his income, he may request a modification review.

IV. Conclusion

Mr. N did not meet his burden to show that CSSD made a mistake when it issued the Amended Administrative Child Support and Medical Support Order. The order set Mr. N's 2016 support obligation at \$50 per month, effective September 2016, based on his lack of reported income. Finding him to be voluntarily and unreasonably unemployed, CSSD correctly set Mr. N's 2017 and ongoing support based on the income he would earn from a full-time, minimum wage job, plus the Alaska PFD. This income results in a support obligation for one child of \$309 per month. No variance was granted under Civil Rule 90.3(c).

²⁷ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

²⁸ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²⁹ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

V. Child Support Order

- The Amended Administrative Child Support and Medical Support Order dated February 27, 2017 is affirmed and remains 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 16th day of May, 2017.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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