

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

IN THE MATTER OF:)	
)	OAH No. 04-0136-CSS
J. H. W., JR.)	CSSD NO. 001091445
_____)	DOR NO. 040733

DECISION AND ORDER

I. Introduction

This case involves the Custodian S. J. M.'s appeal of a Modified Administrative Child Support and Medical Support Order that CSSD issued in the Obligor Mr. W.'s case on September 1, 2004. The Obligee child is J., DOB 00/00/95.

The formal hearing was held on December 14, 2004. Mr. W. appeared in person; Ms. M. appeared by telephone. David Peltier, Child Support Specialist, represented the Child Support Services Division (CSSD). The hearing was tape-recorded. The record closed on January 25, 2004.

Kay L. Howard, Administrative Law Judge for the Alaska Office of Administrative Hearings, was appointed to hear this appeal by the Chief Administrative Law Judge, Terry L. Thurbon. Having reviewed the record in this case and after due deliberation, I have concluded Ms. M.'s appeal should be denied and CSSD's Modified Administrative Child Support and Medical Support Order should be affirmed.

II. Facts

A. History

The Obligor's support order was set at \$608 per month in 1999.¹ Mr. W. initiated modification on May 4, 2004.² On May 6, 2004, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ On September 1, 2004, CSSD issued a Modified Administrative Child Support and Medical Support Order setting modified child

¹ Pre-Hearing Brief at pg. 1.

² Exh. 1.

³ Exh. 2.

support at \$220 per month, effective June 1, 2004.⁴ Ms. M. filed an appeal on October 7, 2004.⁵

At the formal hearing, Ms. M. stated she was surprised to learn that Mr. W.'s child support obligation was being lowered. Ms. M. stated she filed the appeal because she believes Mr. W. is capable of working and earning enough money to continue to pay the child support amount that was previously set at \$608 per month. Ms. M. did not offer any more testimony other than to comment that in her opinion Mr. W. always has been trying to get out of paying child support, as evidenced by the fact that it took four years to locate him in order to initiate the child support action.

Mr. W. provided the bulk of the hearing testimony. He stated he was formerly in the military and before his retirement was an operations sergeant. Mr. W. said he retired on September 1, 2001, with a disability rating of 60%, primarily the result of arthritis. Mr. W. filed a letter from the Department of Veteran's Affairs that states he was honorably discharged from the military and has been rated with a service-connected disability evaluated at 60% as of December 1, 2000.⁶

Mr. W. added he began working for the Alaska Department of Corrections in September 2001 as a corrections officer. He worked for the Department approximately two years then resigned on October 23, 2003 because, on a physical level, he could no longer perform the work required of him as a corrections officer. Mr. W. said his decision to leave the Department was influenced by an assault he suffered at the hands of an inmate, and that a local chiropractor supported his decision to resign because of his physical condition. Mr. W. testified he suffers from almost constant pain in his back and neck, and suffers from migraines. He said he cannot lift heavy objects.

Mr. W. further testified he has an Associate of Arts degree in Criminal Justice, but he is not able to obtain employment and law enforcement or similar professions because of his physical condition. Mr. W. said he applied for a few other jobs after he left the Department of Corrections, such as bagger at Carr's Grocery, probation officer and police officer, but he knew he could not perform the physical work required of those jobs. He said he had applied to the

⁴ Exh. 4.

⁵ Exh. 6.

⁶ Obligor's Exh. A.

Veterans Affairs vocational rehabilitation program and after the hearing provided a letter indicating he is currently participating in a veteran's rehabilitation program that provides services to veterans with service-connected disabilities. The letter adds Mr. W. is pursuing a degree through the University of Alaska and will be finishing in December 2006.⁷

Mr. W. further testified that he is married, and has two biological children in the home, one of whom is older than the Obligor J. Mr. W. said his wife is employed with the P. H. S. and brings home approximately \$4000 per month.

Regarding his annual income, Mr. W. stated he receives retirement pay in the amount of \$1311 per month. He said only \$324 of that amount is taxable due to his disability, so \$987 per month is tax-free. Prior to the hearing, Mr. W. had filed a copy of his Retiree Account Statement that indicates he would begin receiving \$1311 per month as of January 2, 2004.⁸

CSSD questioned whether Mr. W. receives any additional money due to his disability. CSSD stated that Congress had passed legislation allowing military retirees to receive their disability compensation in addition to their retirement pay – known as Concurrent Retirement and Disability Pay (CRDP). CSSD added the program became effective in January 2004 and was being phased in over a 10-year period of time. Mr. W. stated that he had not yet received any of that money because his disability rating is only 60%, and the program at this time is concentrating on compensating those retirees with disability ratings starting in the 90% range.

At the close of the hearing, Mr. W. was directed to file copies of his checking account statements showing his retirement pay deposits, and he was also directed to file a letter from his chiropractor regarding his ability to work and whether there are any work restrictions on him at this time. Ms. M. was asked to file in writing any responses to Mr. W.'s testimony. CSSD was directed to file a Post Hearing Brief with its final statements or evidence.

After the hearing, Mr. W. filed a copy of his Retiree Account Statement that indicates as of January 3, 2005, Mr. W. would begin receiving \$1346 per month in retirement pay.

CSSD filed copies of documents obtained on the Internet regarding the Concurrent Retirement and Disability Pay (CRDP) program. The documents state in essence that the program is to be phased in over a nine-year period of time, and it provides that military retirees

⁷ Exh. 8 at pg. 3.

⁸ Obligor's Exh. T.

who are at least 50% disabled will receive their disability pay in increasing amounts until the total is reached in nine years.⁹

Ms. M. also filed a statement after the hearing. She claims that since Mr. W. is not 100% disabled, he should be able to acquire employment that pays at least the minimum wage. In addition, Ms. M. stated J. was in a vehicle accident in May 2004 and received several injuries, including a concussion and broken arm. Ms. M. stated J. still has eye problems from the accident but has since returned to school.¹⁰

B. Findings

Based on the evidence in the record and after due consideration, I hereby find:

1. Ms. M. did not meet her burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect;¹¹
2. Mr. W. is 60% disabled, primarily from arthritis;
3. Mr. W. is not able to work in his former profession as a corrections officer due to his disabilities; he suffers from significant back pain and migraines and he cannot lift heavy objects;
4. Mr. W. is participating in a Veterans Affairs rehabilitation program and attending college through December 2006;
5. Mr. W.'s income for 2004 consisted of military pay of \$1311 per month.

III. Analysis

Mr. W.'s child support was set at \$608 per month in January 1999.¹² Pursuant to his request for modification, CSSD set modified child support at \$220 per month.¹³ After the hearing, CSSD asserts Mr. W. is voluntarily and unreasonably unemployed and claims income should be imputed to him based on his former income as a corrections officer. Mr. W. claims he is not voluntarily unemployed and insists his only income comes from his military retirement pay.

⁹ Exh. 9.

¹⁰ Exh. 11.

¹¹ See 15 AAC 05.030(h).

¹² CSSD's Pre-hearing Brief.

¹³ Exh. 4.

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”¹⁴ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes “material change in circumstances” has been established. Absent a material change in circumstances, however, a parent’s child support obligation need not be modified.

A. Obligor’s Disability

CSSD claims Mr. W. is not disabled because, after he left the Department of Corrections, he applied only for jobs he knew he could not perform and because he must have been performing work as a corrections officer that consists of sitting and standing for long periods of time, activities he claims he cannot do.

Mr. W. provided statements from the Department of Veterans Affairs that indicate he is 60% disabled, primarily from arthritis, and that he is participating in a vocational rehabilitation program in order to obtain his college degree by December 2006. He did not provide a letter from his chiropractor regarding his ability to work, nor did he explain why he did not file one. Even so, the Department of Veterans Affairs determined Mr. W. qualified for the vocational rehabilitation program. That is sufficient to establish that Mr. W. is disabled.

B. Voluntary Unemployment

CSSD claims as a secondary issue that Mr. W. is voluntarily and unreasonably unemployed. Alaska law allows CSSD to use a parent’s “potential income” if a finding is made that the parent is voluntarily and unreasonably unemployed or underemployed.¹⁵

If a parent is found to be voluntarily unemployed or underemployed, the child support is calculated using his or her “potential income,” which is based on the parent’s “work history, qualifications and job opportunities.”¹⁶ The commentary states that “the totality of the circumstances” should be considered when deciding whether to impute income to the Obligor parent.¹⁷

¹⁴ AS 25.27.190(e).

¹⁵ Civil Rule 90.3(a)(4).

¹⁶ Civil Rule 90.3, Commentary III.C.

¹⁷ Civil Rule 90.3, Commentary III.C.

CSSD takes the position that Mr. W. is voluntarily and unreasonably unemployed and filed a proposed child support calculation of \$673 per month based on Mr. W.'s former wages as a corrections officer and his military retirement pay.¹⁸

After having considered the "totality of the circumstances" in this case, I find that Mr. W. is voluntarily and unreasonably unemployed. Mr. W. testified he worked as a corrections officer as long as he could, but the back pain and migraines, in addition to an assault by an inmate, got to be too much for him, so he resigned. CSSD challenged Mr. W.'s testimony at length, but Mr. W. continued to maintain that he is doing the best he can. CSSD did not prove by a preponderance of the evidence that Mr. W. is voluntarily and unreasonably unemployed.

C. Mr. W.'s Income

A parent is obligated both by statute and at common law to support his or her children.¹⁹ 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."

When Mr. W. first requested a modification of his child support obligation, CSSD calculated his modified child support at \$220 per month, based on his military retirement income.²⁰ At the hearing and in post hearing documents, CSSD asserted that Mr. W.'s income is higher. CSSD claims Mr. W. is eligible for and must be receiving "Concurrent Retirement and Disability Pay" (CRDP), a form of additional compensation authorized by Congress for military retirees who are also disabled.²¹

Mr. W. filed a copy of a checking account statement that shows his 2004 direct deposits from the military. They show only the disability pay of \$987 and the retirement figure of \$324, for total monthly income of \$1311.²² Also, Mr. W. filed a copy of his Retiree Account Statement that shows as of January 3, 2005, he would begin receiving an increase from \$1311 per month to \$1346 per month.²³ Based on the evidence Mr. W. provided, I find that CSSD did not establish Mr. W. received any CRDP in 2004.

¹⁸ Exh. 10.

¹⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

²⁰ Exh. 5.

²¹ Exh. 9 at pgs. 1-2.

²² Exh. 8 at pg. 5.

²³ Exh. 8 at pg. 4.

After the hearing, CSSD imputed Mr. W.'s former wages as a corrections officer to him and calculated a proposed child support amount of \$673 per month.²⁴ Because Mr. W. is not voluntarily and unreasonably unemployed, CSSD may not impute income to Mr. W. for his child support calculation. Rather, his child support should be calculated from his actual 2004 income, which CSSD initially did when Mr. W. filed the petition for modification.

Mr. W.'s reduced income comes at a difficult time for Ms. M., given J.'s vehicle accident and the injuries she sustained in it. However, Ms. M. stated J. was back in school, so she obviously has improved since the accident. This situation will be even better when Mr. W. obtains an ID card and additional medical insurance for J.

IV. Conclusion

Mr. W. was determined by the military to be 60% disabled, primarily by arthritis, and enrolled him in a vocational rehabilitation program in which he is obtaining a college degree. Mr. W. is not voluntarily and unreasonably unemployed, and income cannot be imputed to him. Mr. W.'s child support should be calculated from his actual retirement income, as done by CSSD initially in this modification action. Neither Ms. M. nor CSSD met the burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. Thus, CSSD's order should be affirmed.

Accordingly, I issue the following child support order:

III. Child Support Order

1. The September 1, 2004, Modified Administrative Child Support and Medical Support Order is affirmed.
2. Mr. W. is liable for modified ongoing child support in the amount of \$220 per month, effective June 1, 2004.

DATED this 25th day of March, 2005.

By: Signed _____
Kay L. Howard
Administrative Law Judge

²⁴ Exh. 10.

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Terry L. Thurbon, Chief Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of J. H. W., Jr. be adopted as of this date and entered in his file as the final administrative determination in this appeal.

Under AS 25.27.062 and AS 25.27.250 the Obligor's income and property are subject to an order to withhold. Without further notice, a withholding order may be served on any person, political subdivision, department of the State or other entity.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of this decision, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and, if mailed, be addressed: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

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 of the date of this decision.

DATED this 25th day of March, 2005.

By: Signed _____
Terry L. Thurbon
Chief Administrative Law Judge

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