

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

IN THE MATTER OF: )

H. S. D. )

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) OAH No. 06-0565-CSS

) CSSD No. 001139990

**DECISION AND ORDER**

**I. Introduction**

This matter involves the Obligor H. S. D.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on July 14, 2006. The Obligee child is L., DOB 00/00/95.

The formal hearing was held on August 30, 2006. Mr. D. participated by telephone; the Custodian, S. L. R., appeared in person. David Peltier, Child Support Specialist, represented CSSD. The record closed on October 27, 2006.

Kay L. Howard, Administrative Law Judge, Alaska Office of Administrative Hearings, conducted the hearing. Having reviewed the record in this case and after due deliberation, Mr. D.'s ongoing child support should be set at \$871 per month.

**II. Facts**

**A. History**

Ms. R. applied for child support services in November 2005.<sup>1</sup> After paternity was established, CSSD served an Administrative Child and Medical Support Order on Mr. D. on June 5, 2006.<sup>2</sup> He requested an administrative review.<sup>3</sup> Following the review, CSSD issued an Amended Administrative Child Support and Medical Support Order on July 14, 2006, that set Mr. D.'s ongoing child support at \$1049 per month, with arrears of \$8379 for the period from November 2005 through July 2006.<sup>4</sup> Mr. D. filed an appeal and requested a formal hearing on August 2, 2006. His appeal asserted he had never earned the amount of money CSSD used to calculate his child support.<sup>5</sup>

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<sup>1</sup> Post-hearing brief at pg. 1.

<sup>2</sup> Exh. 6.

<sup>3</sup> Exh. 7.

<sup>4</sup> Exh. 11.

<sup>5</sup> Exh. 12.

## **B. Material Facts**

Mr. D. and Ms. R. are the parents of L., DOB 00/00/95. L. lives with Ms. R. Paternity of the child was established by genetic testing and CSSD's administrative order.<sup>6</sup>

Mr. D. lives in western Alaska.<sup>7</sup> He works on the North Slope and also at various times in the construction industry as a heavy equipment operator. In June 2005 he began working for ASRC Energy Services, Inc., in a year-round, 2 weeks-on/2 weeks-off position. He received \$23.50 per hour, plus time-and-a-half for overtime. As of April 23, 2006, Mr. D. had year-to-date earnings from ASRC of \$26,255.76.<sup>8</sup>

In May 2006, Mr. D. began a 90-day leave of absence from ASRC. He indicated at the hearing that he planned to extend the leave to four months, which would conclude at the end of September 2006. During his leave of absence, Mr. D. worked for Knik Construction, where he received \$31.05 per hour, in addition to a "fringe" payment of \$11.40 per hour.<sup>9</sup> As of August 16, 2006, Mr. D. had earned \$35,975.25 from Knik Construction.<sup>10</sup>

On September 18, 2006, CSSD filed a revised child support calculation. The agency used Mr. D.'s year-to-date income from ASRC and Knik Construction to estimate his total annual income for 2006 would be \$97,662.04.<sup>11</sup> This income figure included \$19,691.82 that CSSD projected Mr. D. would earn from ASRC upon his return to the company after his leave of absence and temporary work at Knik Construction. CSSD's calculation yielded a child support amount of \$1069 per month.<sup>12</sup>

On September 22, 2006, Mr. D. filed a statement that says:

I am no longer working for ASRC. My leave of absence ended Aug. 1<sup>st</sup>. There for [sic] the projected amount of money you forswore me making does not apply to the amount of my annual income for this year, (\$19,691.82).<sup>13</sup>

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<sup>6</sup> Exhs. 4 & 5.

<sup>7</sup> Except where indicated, the facts are taken from Mr. D.'s hearing testimony.

<sup>8</sup> Exh. 14 at pg. 2.

<sup>9</sup> *Id.* at pg. 4.

<sup>10</sup> *Id.*

<sup>11</sup> Post-Hearing Brief at pg. 1.

<sup>12</sup> Exh. 15.

<sup>13</sup> Letter dated September 22, 2006.

After Mr. D. submitted the letter saying that he was no longer working for ASRC, the record in this appeal was reopened. Mr. D. was directed to submit a detailed statement explaining the circumstances surrounding his termination from ASRC and what his plans were for securing employment. CSSD was asked to contact Mr. D.'s employers and ascertain his employment status with each company.

On October 16, 2006, CSSD filed a statement that the agency had contacted Mr. D.'s employers. CSSD was informed he was no longer employed by either ASRC or Knik Construction and both companies would not provide any information regarding whether he was terminated or quit.<sup>14</sup>

On October 30, 2006, Mr. D. filed a statement that said:

When my 90 day leave of absence ended with ASRC I wasn't able to return the call about returning to work. There for [sic] they (ASRC) laid me off from my position with the company. On Sept. 25, the job w/ Knik Construction was completed. I was then laid off w/ them also. I am not currently able to return to work for ASRC due to lack of open positions but have re-sent them my resume.<sup>[15]</sup>

### III. Discussion

A parent is obligated both by statute and at common law to support his or her children.<sup>16</sup> By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren).<sup>17</sup> Ms. R. applied for child support services in November 2005, so Mr. D.'s support obligation pursuant to this administrative child support case is effective as of November 2005.<sup>18</sup>

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. CSSD initially calculated Mr. D.'s 2005 child support at \$518 per month, based on his total 2005 income, and \$683 per month for 2006, which was calculated from a wage of \$25 per hour.<sup>19</sup> After he

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<sup>14</sup> Response to Interim Order.

<sup>15</sup> Letter dated October 25, 2006.

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

<sup>17</sup> 15 AAC 125.105(a)(1)-(2).

<sup>18</sup> See Exh. 1 & Exh. 11 at pg. 10.

<sup>19</sup> Exh. 6 at pgs. 4, 8, 9.

requested a review of the Administrative Child Support and Medical Support Order, CSSD issued an administrative review decision that left the 2005 support amount unchanged, but increased the 2006 figure to \$1049 per month.<sup>20</sup> This amount was calculated from an estimated annual income of \$84,715.76, which CSSD determined by multiplying Mr. D.'s first quarter 2006 earnings of \$21,178.94 times four quarters.<sup>21</sup> After Mr. D. filed his appeal, and prior to the hearing, CSSD submitted a draft child support calculation of \$447 per month, based on a 3-year average of Mr. D.'s income.<sup>22</sup>

CSSD's calculation of Mr. D.'s 2005 child support amount at \$518 per month appears to be correct because it is based on his actual income as reported to the Alaska Department of Labor and Workforce Development and also as reflected on his 2005 tax return.

The 2006 child support amount is not so easy to pin down. The fact that Mr. D. was terminated from two jobs at practically the same time after the hearing is somewhat suspicious and it raises the question whether he voluntarily left at least one of those positions. Mr. D.'s testimony was not very credible, especially when his second job at Knik Construction came to light during somewhat vigorous cross examination. It is not clear that he would have divulged his construction job in the absence of pointed questions. Moreover, Mr. D. claimed in a request for administrative review dated June 5, 2006, that his "gross annual income is \$29,680.80 . . . ."<sup>23</sup> This statement is disingenuous, at best, as Mr. D. had already earned \$26,255.76 from ASRC on April 23, 2006, and before he started working for Knik Construction.<sup>24</sup>

The Obligor has the burden of proving his or her earning capacity.<sup>25</sup> 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.<sup>26</sup> It is not necessary to prove the parent was purposefully avoiding a support obligation, or acting in bad faith, in order to find voluntary unemployment or underemployment.<sup>27</sup> The Alaska Supreme Court has upheld lower court

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<sup>20</sup> Exh. 11 at pg. 7.

<sup>21</sup> Exh. 16.

<sup>22</sup> Exh. 13.

<sup>23</sup> Exh. 7 at pg. 1.

<sup>24</sup> See Exh. 14 at pg. 2.

<sup>25</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>26</sup> Civil Rule 90.3(a)(4).

<sup>27</sup> *Kowalski*, 806 P.2d at 1371.

decisions finding noncustodial parents voluntarily unemployed or underemployed who were not making their best efforts to obtain or retain employment.<sup>28</sup>

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.”<sup>29</sup> The commentary states “the totality of the circumstances” should be considered in a decision whether to impute income to the obligor parent.<sup>30</sup> In Mr. D.’s case, the income that would be imputed to him is the additional \$19,691.82 that CSSD estimated he would earn from ASRC in 2006 after his leave of absence was concluded.<sup>31</sup>

After having considered the “totality of the circumstances,” I find that the record in this case does not support a finding that Mr. D. is voluntarily and unreasonably unemployed. Although the possibility was raised by the fact that both of Mr. D.’s jobs ended rather mysteriously after the hearing, the evidence in its entirety is insufficient to make such a finding. As a result, Mr. D.’s 2006 child support should be calculated from the total annual income it is estimated he earned prior to becoming unemployed.

Mr. D. earned \$26,255.75 from ASRC during the beginning of the year. After starting his leave of absence from that company, he earned at least \$35,975.25 working for Knik Construction. CSSD estimated he would receive \$15,739.22 for the month of September 2006, but Mr. D. wrote his job with Knik ended on September 25, 2006, so the portion of that figure that represents five days’ earnings should be subtracted before the final calculation is completed.<sup>32</sup> Mr. D.’s September 2006 earnings are thus estimated at \$13,116.02, which results in total earnings in 2006 of \$75,347.02. Using CSSD’s online child support calculator at <http://www.childsupport.alaska.gov/>, results in a child support amount of \$871 per month.<sup>33</sup> Based on the hearing testimony and the record as a whole, I find this figure is correct.

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<sup>28</sup> *Id.* at 1370.

<sup>29</sup> Civil Rule 90.3, Commentary III.C.

<sup>30</sup> *Id.*

<sup>31</sup> *See* Post-Hearing Brief at pg. 1.

<sup>32</sup> Mr. D.’s daily earnings from Knik Construction are estimated to have been \$524.64 ( $\$15,739.22 \div 30$  days) times five days = \$2,623.20.

<sup>33</sup> *See* Attachment A.

Mr. D. may believe now that he is unemployed, his child support will be calculated from his unemployment benefits, but as stated before, child support calculations are based on annual income. His unemployment is a temporary circumstance that will improve when he finds another job. The Alaska Supreme Court discourages adjustment of support amounts for Obligor who are temporarily unemployed.<sup>34</sup> Mr. D. may not be able to pay his child support in full every month while he is unemployed temporarily, but the fact of his unemployment will not excuse the support obligation.<sup>35</sup> Mr. D. will likely incur some arrears while he is unemployed, but he will be able to start paying those off once he starts working again.

#### **IV. Conclusion**

Mr. D. met his burden of proving by a preponderance of the evidence that the Amended Administrative Child Support and Medical Support Order was incorrect. Thus, his child support obligation is now correctly calculated at \$518 per month for 2005 and \$871 per month for 2006 and ongoing.

#### **V. Child Support Order**

- Mr. D. is liable for child support in the amount of \$518 per month for November 2005 and December 2005; and \$871 per month for January 2006 through December 2006, and ongoing.

DATED this 5th day of December, 2006.

By: Signed  
Kay L. Howard  
Administrative Law Judge

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<sup>34</sup> *Patch v. Patch*, 760 P.2d 526 (Alaska 1988).

<sup>35</sup> *See also, Douglas v. State*, 880 P.2d 113 (Alaska 1994).

**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 21st day of December, 2006.

By: Signed  
Signature  
Kay L. Howard  
Name  
Administrative Law Judge  
Title

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