

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

IN THE MATTER OF:)
)
J. L. M.)
)
_____) OAH No. 06-0766-CSS
) CSSD Case No. 001140731

DECISION AND ORDER

I. Introduction

This case concerns the child support obligation of J. L. M. for E. K. (DOB 00/00/04). The custodian of record is C. K.

On September 21, 2006, the Child Support Services Division issued an Amended Administrative Child Support Obligation and Medical Support Order, establishing Mr. M.'s child support obligation for arrears and ongoing support in the amount of \$50 per month.

Ms. K. filed an appeal and requested an administrative hearing. The matter was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted a telephonic hearing on December 6, 2006. Mr. M. and Ms. K. participated and testified. Andrew Rawls represented the division.

Based on the testimony and evidence in the record, ongoing child support will be set at \$116 per month.

II. Facts

J. M. has primary custody of two biological children (a boy age 10; a girl age 9) and one stepchild (a boy age 12). The biological children live with Mr. M. during the school year and alternate weekly with their mother during the summer under a custody decree. The stepchild lives with Mr. M.. For the last six years, Mr. M. has lived with his two biological children in a residence located at Mile X of the Chena Hot Springs Road, outside of Fairbanks. The children currently attend school in Fairbanks, and there is no school bus service to Mr. M.'s residence: he drops the children off at school in the

morning and picks them up after school. There is no preschool or afterschool daycare available on the school premises for any of the children at their current school. One of the children, Mr. M.'s biological son, has had behavioral problems and attends a special program. Mr. M.'s biological children's mother is subject to a child support order in the amount of \$153 per month, but is not paying on the order. His stepdaughter's father is subject to a child support order in the amount of \$93 per month, but is not paying on the order.

Until June, 2006, Mr. M. was a college student, working towards a degree in psychology. Mr. M. is currently employed part-time as an apprentice electrician, earning \$11 per hour for 16.5 hours per week. His work hours are limited by his need to transport the children to and from school. If his son is placed in a mainstream school program, he will be able to work 27.5 hours per week, because the transportation time would be cut back since only one school would be involved.

C. K. works at a restaurant, 25 hours per week. She has two biological children in her primary custody, a nine-year-old boy and E.. She lives on Badger Road, about six miles outside Fairbanks, and at present does not need to pay for child care for E. or her son.

III. Discussion

The division's initial order set arrears and ongoing support at the rate of \$167 per month, based on the Alaska minimum wage of \$7.15 per hour for full-time employment, with a credit for two older children in the home.¹ The division's amended order set arrears and ongoing support at the rate of \$50 per month, based on Mr. M.'s actual earnings, his part-time employment, and half-time student status.² At the hearing, the division recommended a finding of voluntary underemployment, and a support order based on imputed income for full time work at \$11 per hour (which would result in a support order of \$245 per month).

1. Arrears

Arrears are generally calculated based on actual income. In this case, the period of arrears is January through June, 2006, during the time when Mr. M. was a student and

¹ Ex. 2.

² Ex. 8.

had minimal income. The division's order for arrears in the amount of \$50 per month during that time is not in dispute.

2. *Ongoing Support*

Under 15 AAC 125.070(a), the presumptive support obligation is based on annual income during the time the order will be in effect. Mr. M. currently earns a wage of \$11 per hour and works 16.5 hours per week. Based on his current wages and work hours, Mr. M.'s annual earned income is \$9,438, his total income for child support purposes (including his Alaska Permanent Fund dividend) is \$10,544.96, and his presumptive support obligation is \$116 per month.³

Under 15 AAC 125.060(a), the child support obligation may be based on potential income, if the parent is voluntarily underemployed. The division argues that Mr. M. is voluntarily underemployed, and that his potential income should be based on full time work at his current wage of \$11 per hour.

The division argues that Mr. M.'s limited work schedule is the result of his decision to live in an isolated location, where transportation is not readily available. It argues that single parents in Alaska routinely make adjustments to enable them to work full time. Mr. M. could move into Fairbanks, the division suggests, and work full time at his current wage of \$11 per hour.

This argument, however, overlooks the fact that Mr. M. has not chosen to live in an isolated location in order to avoid paying child support: his decision to live at his current location was made when he had a pre-existing support obligation for two children, and his duty of support to his subsequent child does not outweigh his parental obligations to his prior children. Whether it would be in the best interests of his two biological children and his stepchild for Mr. M. to move into Fairbanks in order to increase his earnings so that he can pay increased child support for his youngest child is a question that cannot be ignored, even if it cannot be answered in this forum.

The division's argument also overlooks the fact that Mr. M. is supporting three children, including two older children of his own, without any financial assistance from their other parent, while Ms. K. will, under this order, receive additional child support assistance from Mr. M. Certainly, moving from the family residence to another location

³ 16.5 hours x 52 weeks = 858 hours. 858 hours @ \$11 = \$9,438. See Appendix A.

might lead to an increase in Mr. M.'s income, but this does not mean that he is presently voluntarily and unreasonably unemployed.⁴ He is raising three children on his own and working 16.5 hours per week with a prospect of increasing to 27.5 hours per week; Ms. K., another single parent, is herself working only 25 hours per week, just slightly more than Mr. M. is.

These observations explain why, under the circumstances of this case, a finding of voluntarily underemployment is not warranted, and the child support obligation should be set at the presumptive level. This conclusion is buttressed by consideration of Mr. M.'s potential income. The division suggests it is \$11 per hour for full time work, based on his current wage. But Mr. M. testified that his employer does not have full time work available, and thus there is no evidentiary basis for imputing income at that level. Given his child care obligations and past work history, it is likely that if Mr. M. did move to Fairbanks and obtain full-time work, it would be at the minimum wage, reflecting his prior actual work history, his transportation problems and his parental obligations: the resulting support order would be the division's initial order of \$167 per month. The difference between Mr. M.'s support obligation at his actual income (\$116 per month) and at his potential income (\$167 per month) is only \$50 per month, which does not warrant imposing on Mr. M. the obligation to move to Fairbanks.

IV. Conclusion

In light of the totality of the circumstances, Mr. M. is not voluntarily and unreasonably underemployed. His child support obligation should be set at the presumptive amount based on his actual income.

⁴ "The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed....The court shall consider the totality of the circumstances in deciding whether to impute income." Civil Rule 90.3, Commentary at III(C).

ORDER

1. Mr. M.'s amended ongoing child support obligation is set at the rate of \$116 per month effective July 1, 2006.
2. Mr. M. is liable for any arrears accrued beginning January 1, 2006 through June 30, 2006, at the rate of \$50 per month.

DATED: December 29, 2006.

Signed

Andrew M. Hemenway
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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of January, 2007.

By: Signed
Andrew M. Hemenway
Administrative Law Judge

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