

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

In the Matter of)	
)	
K E)	OAH No. 18-1061-CSS
<hr style="width: 80%; margin-left: 0;"/>)	Agency No. 001198871

DECISION AND ORDER

I. Introduction

Custodial parent C C appeals a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on September 15, 2018. The modified order reduced K E’s child support obligation for the parties’ twins, U and E, to \$1,115 per month.

Based on the evidence in the record and after careful consideration, CSSD appropriately calculated Mr. E’s expected income and relied on it to set his modified support amount. Ms. C raised legitimate concerns about recent changes in Mr. E’s employment and income. However, Mr. E adequately explained that the changes are not the result of voluntary and unreasonable underemployment. Therefore, the modified support order is affirmed.

II. Facts and Proceedings

A. Material Facts

K E and C C are the parents of six-year-old twins, U and E.¹ Both parents live in Anchorage. Ms. C exercises primary physical custody.

Mr. E is forty-four years old. He is eligible for the PFD. For the last twenty years, he has worked in the commercial flooring industry, primarily as a flooring mechanic. Mr. E’s job involves flooring installation. He currently earns \$40 per hour and works for two different employers.² Through the first half of 2018, Mr. E earned \$29,724.13 in gross wages.³ On an annual basis, this results in gross income of \$59,448.26. This income is consistent with Mr. E’s 2017 gross wages, which were \$59,604.96.⁴

Mr. E does not work on salary. He is paid weekly based on his actual hours. His weekly hours vary seasonally as well as based on the opportunities available through his employers at

¹ Exhibit 1.
² Exhibit 4, p. 4; E testimony.
³ Exhibit 7.
⁴ Exhibit 7.

any given time. In general, Mr. E works full-time. He estimated that his average hours are between 30 and 40 hours each week.

Before 2017, Mr. E worked primarily for a different employer. His jobs were usually out of town, and he was away from home for extended periods of time. Working remotely resulted in long hours and significant overtime pay. As a result, Mr. E earned gross wages of \$112,809.50 in 2015 and \$93,658.72 in 2016.⁵

For reasons that are not clear, Mr. E lost his job with that employer in November or December 2016. He found work with other employers, but they limit the availability of overtime.⁶ Mr. E also indicated that flooring work has been hard on his knees, and he is no longer physically capable of working the overtime hours he previously worked. In addition, he is no longer willing to spend so much time working away from home. His current jobs do not require significant travel. Because he is not working remotely and earning significant overtime pay, Mr. E's income in 2017 and 2018 is substantially below his 2015 and 2016 earnings. He does not expect this to change in the foreseeable future.

Mr. E testified that he does not work "under the table" for cash or other forms of compensation. He once helped his sister's boyfriend install flooring, but he offered his skills as a friend and was not compensated in any way. Sometime after this, Mr. E began renting an apartment from this friend. Ms. C recalled that Mr. E once told her he helped his landlord install flooring in lieu of paying rent. She therefore came to believe that Mr. E's employer-reported wages may not reflect all his income.

Mr. E denied having any other income sources, asserting that he has never worked for cash or in-kind benefits like housing. Based on the limited information in the record, Mr. E's statements are credible and more likely than not true. Therefore, his employer-reported wages likely are his sole sources of income.

B. Procedural History

⁵ Exhibit 7.

⁶ E testimony.

Mr. E's support obligation for U and E was last reviewed in 2017, when it was set at \$1,329 per month.⁷ Ms. C requested a modification review, and CSSD served both parents with notice of the petition for modification in May 2018.⁸

On September 15, 2018, CSSD issued a decision granting the modification review.⁹ It also issued the Modified Child Support and Medical Support Order that is the subject of this appeal.¹⁰ The modified order was based on CSSD's determination that Mr. E likely will earn \$59,448.26 in 2018 wage income, plus the PFD.¹¹ After deductions for matters such as federal income taxes and Social Security/Medicare withholding, this income resulted in a child support obligation of \$1,115 per month for two children.

Ms. C requested a formal hearing.¹² She questioned whether Mr. E's actual income is higher than as reported to the Department of Labor. She also asserted that his decreased income in the last two years is the result of a voluntary and unreasonable choice, since he could be earning up to \$120,000 annually.¹³

The formal hearing took place on November 6, 2018. Ms. C appeared in person and represented herself. Mr. E appeared telephonically and represented himself. Child Support Specialist Patrick Kase appeared in person and represented CSSD. The hearing was recorded. All submitted documents were admitted, and the record closed at the end of the hearing.

III. Discussion

In a child support matter, the person who files an appeal bears the burden of proof.¹⁴ Ms. C filed this appeal, so she must prove by a preponderance of the evidence that the Modified Administrative Child Support and Medical Support Order is incorrect.¹⁵

Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹⁶ 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"

⁷ Exhibit 1.

⁸ Exhibit 2; CSSD pre-hearing brief, p. 1.

⁹ Exhibit 5.

¹⁰ *Id.*

¹¹ Exhibit 5, p. 8.

¹² Exhibit 6.

¹³ Exhibit 6.

¹⁴ 15 AAC 05.030(h).

¹⁵ 2 AAC 64.290(e).

¹⁶ AS 25.27.190(e).

has been established and the order should be modified. Mr. E's former obligation was \$1,329 per month, so a change of \$199.35 per month or more will satisfy this standard.¹⁷

A modification is effective beginning the month after the parties are served with notice that a modification has been requested.¹⁸ In this case, CSSD issued notice of the petition for modification in May 2018. Therefore, the modification is effective as of June 1, 2018.

Civil Rule 90.3(a) 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, the relevant time period is the period for which the support is being paid.¹⁹ By its nature, this determination is a somewhat uncertain endeavor, since the relevant calculation includes an assessment of expected future income.²⁰

The evidence supports CSSD's determination of Mr. E's expected 2018 wages, \$59,448.26. This is based on his actual income over the first half of the year, and it is nearly identical to his actual 2017 wages. Though this sum is markedly less than Mr. E earned in 2015 and 2016, Mr. E explained his changed employment circumstances and resulting changes in income. He also explained that this is not a temporary situation but instead is a stable and relatively permanent one. This is consistent with the evidence in the record.

Ms. C alleged that, given his work and income history, Mr. E could be earning significantly more money, but he chooses not to. This raises the issue of voluntary and unreasonable underemployment. When a parent is voluntarily and unreasonably unemployed or underemployed, his or her child support obligation may be calculated from his or her "potential income," which is based on the parent's work history, qualifications and job opportunities.²¹

In deciding whether an obligor-parent is voluntarily and unreasonably underemployed, the tribunal is to consider the totality of the circumstances, including such factors as whether the income reduction is temporary, and whether it is the result of economic factors or of purely personal choices. The parent with primary physical custody has the burden to make a prima

¹⁷ \$1,329 x 15% = \$199.35.

¹⁸ 15 AAC 125.321(d).

¹⁹ Civil Rule 90.3(a). *See also* 15 AAC 125.020, 15 AAC 125.030.

²⁰ Civil Rule 90.3, Commentary III.E.

²¹ Civil Rule 90.3(a)(4). *See also* 15 AAC 125.020(b).

facie case. After that initial burden is met, the burden of persuasion shifts to the obligor to rebut the claim.²²

To be considered voluntarily underemployed, a parent must engage in voluntary conduct for the purpose of becoming or remaining unemployed or underemployed.²³ The record does not support that finding in this case. The evidence is that Mr. E is working diligently to earn income from full-time work. He did not explain all the circumstances surrounding the loss of his job in late 2016, except to say he was terminated. He strongly implied that the termination was the result of economic factors, not his own preferences or lifestyle choices. He has continued working for other employers; however, the work is local and involves fewer overtime hours.

Some element of personal preference is involved in his current employment situation, since Mr. E has opted not to seek work that would require him to travel and work extended overtime hours. Mr. E's earnings were quite high in 2015 and 2016 because of those factors. The record does not show whether he earned similar income in the years prior to 2015, or whether those two years were relatively isolated events.

The record does not support Ms. C's allegation that Mr. E could be earning up to \$120,000 each year. Nonetheless, she has raised a legitimate concern about his recent income reduction. However, weight of the evidence is that Mr. E is not voluntarily and unreasonably underemployed. After losing his prior employment, he acted reasonably in obtaining other full-time work. The limitation on overtime hours in his new employment situation adequately and reasonably explains his decreased income. As a result, CSSD appropriately set his child support obligation based on his actual income rather than imputed income.

Mr. E does not pay union dues or health insurance premiums, and he does not contribute to a retirement plan. After deductions for matters such as federal income taxes, and Social Security/Medicare withholding, his expected 2018 income results in a primary custody calculation of \$1,115 per month for two children, as CSSD's modified support order shows.

IV. Conclusion

Ms. C did not show that the September 15, 2018 Modified Administrative Child Support and Medical Support Order should be adjusted. For the reasons discussed above, CSSD correctly modified Mr. E's obligation for U and E based on his actual income. This results in a

²² *Farr v. Little*, 411 P.3d 630 (Alaska 2018).

²³ *Id.*

support amount of \$1,115 per month, effective June 1, 2018 and ongoing, and it reflects a material change in circumstances. The calculation was made pursuant to Civil Rule 90.3(a) without variation.

V. Child Support Order

- The Modified Administrative Child Support and Medical Support Order dated September 15, 2018 is affirmed and remains in full force and effect.

DATED: November 26, 2018.

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

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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 13th day of December, 2018.

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

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