

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

IN THE MATTER OF:)

J. A. S. A.)

) OAH No. 08-0036-CSS

) CSSD No. 001145162

DECISION AND ORDER

I. Introduction

The Obligor, J. A. S. A., appeals a Notice of Denial of Modification Review that the Child Support Services Division (“CSSD”) issued in his case on January 15, 2008. The Obligee child is J., DOB 00/00/05. The formal hearing was held on May 1, 2008. Mr. A. appeared in person; the Custodian, C. T. T., did not participate. David Peltier, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on May 8, 2008.

Kay L. Howard, Administrative Law Judge, Alaska Office of Administrative Hearings, conducted the hearing. Based on the record and after due deliberation, CSSD’s Notice of Denial of Modification Review is affirmed.

II. Facts

Mr. A.’s child support order for J. previously was set at \$363 per month in April 2007. On October 23, 2007, Mr. A. requested modification of his child support order.¹ On October 25, 2007, CSSD issued a Notice of Petition for Modification of Administrative Support Order.² Mr. A. did not document his income.³ On January 15, 2008, CSSD issued a Notice of Denial of Modification Review for the reason that Mr. A. did not provide income information.⁴ On January 21, 2008, Mr. A. filed an appeal and requested a formal hearing, asserting he wanted to have paternity testing.⁵ CSSD filed a Motion for Summary Adjudication on January 24, 2008, claiming the division is entitled to judgment as a matter of law. CSSD asserts Mr. A. did not provide the correct information for a modification and moreover, his appeal only requested paternity testing, which CSSD is not able to provide because he voluntarily acknowledged

¹ Exh. 1.

² Exh. 2.

³ Motion for Summary Adjudication at pg. 1.

⁴ Exh. 3.

⁵ Exh. 4.

paternity of the child. At Mr. A.'s request, the formal hearing was delayed until May 1, 2008, because he was working in a remote location and wanted to be able to appear personally at the hearing in Anchorage.

Mr. A. testified that he is employed in the fish processing industry and works seasonally throughout Southeast Alaska during the spring and summer months. He said he had earned about \$18,000 in 2007, but estimated he would not receive that much in 2008. He has most recently been working for Adak Fisheries in Adak, Alaska, where he earned \$7.15 per hour and received only about \$6,000 total. Mr. A. agreed to provide his 2007 income tax return after the hearing and CSSD agreed to withdraw its Motion for Summary Adjudication in lieu of a decision and order on the merits of Mr. A.'s appeal.

After the hearing, Mr. A. provided his 2007 income tax return, which indicates he received wages of \$14,045 in 2007, plus the PFD.⁶ In addition, he also withdrew funds from a pension account in the amount of \$11,930, thus making his total taxable income \$27,629.⁷ Mr. A. submitted a letter with his tax return requesting that the withdrawal from his retirement account not be considered in the child support calculation because it was a one-time payment and does not reflect his earnings. He claimed he used the money for his “survival”.⁸

After reviewing Mr. A.'s 2007 tax return, CSSD prepared two draft calculations. The first one includes all of the taxable income reflected on his tax return, including the retirement withdrawal; this calculation yields a child support amount of \$401 per month.⁹ CSSD also prepared a second calculation based only on the earnings Mr. A. reported in 2007. Without the retirement funds included in the income figure, Mr. A.'s 2007 wages result in a child support calculation of \$235 per month.¹⁰

III. Discussion

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”¹¹ 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

⁶ Exh. 6 at pg. 2.

⁷ *Id.*

⁸ Exh. 6 at pg. 1.

⁹ Exh. 7.

¹⁰ Exh. 8.

¹¹ AS 25.27.190(e).

circumstances” has been established. The Obligor has the burden of proving his or her earning capacity.¹² The person who filed the appeal has the burden of proving CSSD’s action, in this case, denying the request for a modification review, was incorrect.¹³

Mr. A.'s request for modification of his child support order should be denied. While it appears that Mr. A.'s 2008 earnings might be lower than they have been in the past, his total income for the year remains unknown. His current child support order is \$363 per month for one child. His 2007 tax return reflects total income of \$27,629, but a substantial portion of that figure constitutes a one-time withdrawal from his retirement savings. Using just his earnings from 2007, a child support calculation would yield a figure of \$235 per month, as indicated in CSSD’s Post Hearing Brief.

It would be unfair to J. to lower Mr. A.’s child support based on his 2007 wages alone, as it is clear from his 2007 tax return that Mr. A. had resources other than his earnings with which to support himself and, had they been living in the same home, would have been available to J.. Similarly, it would not be appropriate to modify Mr. A.’s child support upward based on his total taxable income in 2007. His retirement withdrawal was a one-time event that apparently will not be available to him in the future and that should not be used for an upward modification. Therefore, based on these considerations, CSSD correctly denied Mr. A.'s request for modification and the order should be affirmed.

One final issue should be addressed. Mr. A. requested paternity tests, but CSSD cannot provide them to him at this time. Mr. A. apparently acknowledged paternity in writing, so he must request disestablishment of his paternity in court.¹⁴

IV. Conclusion

Mr. A. did not meet his burden of proving that CSSD’s Notice of Denial of Modification Review was incorrectly issued. He did not establish “good cause and material change in circumstances” sufficient to modify his ongoing child support, so CSSD’s Notice of Denial of Modification Review should be affirmed. Also, in the event Mr. A. still wants to address the paternity issue, he must do so in court.

¹² *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹³ 15 AAC 05.030(h).

¹⁴ *See* AS 25.27.166(a)(2).

V. Child Support Order

1. CSSD's January 15, 2008, Notice of Denial of Modification Review is affirmed;
2. Mr. A. remains liable for paying child support in the amount of \$363 per month for one child.

DATED the 27th day of June, 2008.

By: Signed
Kay L. Howard
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 14th day of July, 2008.

By: Signed
Signature
Christopher Kennedy
Name
Deputy Chief Administrative Law Judge
Title

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