

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

IN THE MATTER OF:)	
)	OAH No. 09-0214-CSS
J. P. M. JR.)	CSSD No. 001066486
_____)	

DECISION AND ORDER

I. Introduction

The Obligor, J. P. M., Jr., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on March 16, 2009. The Obligee child is R., DOB 00/00/97.

The hearing was held on May 6, 2009. Mr. M. participated by telephone; the custodian, C. M. T., appeared in person. Andrew Rawls, Child Support Specialist, appeared for CSSD. The hearing was recorded; the record closed on May 15, 2009.

Kay L. Howard, Administrative Law Judge, conducted the hearing. Based on the evidence as a whole and after careful consideration, CSSD's February 27, 2009, Modified Administrative Child Support and Medical Support Order is affirmed, with one adjustment: the modified ongoing child support amount is set at \$527 per month, not \$611 per month.

II. Facts

A. History

Mr. M.'s child support obligation for R. previously was set at \$50 per month in 1999.¹ Ms. T. initiated modification of the order on October 1, 2008.² On October 15, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Neither party provided income information.⁴ On March 16, 2009, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. M.'s modified ongoing child support at \$611 per month, effective November 1, 2008.⁵ Mr. M. filed an appeal on April 10, 2009, and

¹ Exh. 1.
² Exh. 2.
³ Exh. 3.
⁴ Pre-hearing brief at pg. 1.
⁵ Exh. 4.

asserted his income is lower than the amount CSSD used, his current rate of pay is \$9.50 per hour, he and his wife have a newborn child and he cannot afford the amount CSSD calculated.⁶

B. Material Facts

Mr. M. and Ms. T. are the parents of R., DOB 00/00/97. R. lives with his mother in Alaska; Mr. M. lives in California. Mr. M. is married;⁷ he and his wife H. have a child named A. who was born on 00/00/09.⁸

From December 2007 through October 2008, Mr. M. was employed by The Industrial Company (“TIC”), a company that makes industrial sized air cleaners for refineries. Mr. M. started there as an iron worker and when he left he was the safety coordinator. He earned \$20 per hour for 60 hours of work per week, plus \$70 per diem.

Mr. M. quit his job at TIC in October 2008, when the company moved to the city of Bakersfield, a distance of 2.5 – 3 hours away. On November 17, 2008, he started working as a security guard at the C. C. of South Bay in Gardena, California, where he earns \$9.50 per hour. When Mr. M. was asked whether he had been looking for work that pays more, he responded there is “no other job” he would rather have and he would rather work at his current job for \$9.50 per hour than work in a construction job that pays \$100 per hour. Mr. M. explained that both he and his wife have families in the area where they now live, so they don’t want to move from their present location. Also, he said he is working at the C. C. because he believes he was called there and he plans to stay there because of his convictions. He said he would not leave, regardless.

Mr. M.’s wife H. is not working, although she was employed before their child A. was born. It is not known whether she plans to return to work in the future. Mr. M.’s monthly expenses include \$800 for rent; \$50 for utilities; \$112 for two cell phones; \$60 for gasoline; \$25 for maintenance; \$95 for insurance; \$30 for personal care items, and higher, now that they are having to buy diapers; and \$200 for two credit card payments. Mr. M. and his wife have Alaska student loan balances, both of which total \$23,000, and the family has a debt of \$5,000-\$6,000 for medical costs. They have two older vehicles that are both paid off.

In 2008, Mr. M. earned a total of \$45,717, the bulk of it in the first three quarters of the year.⁹ The last quarter of 2008, he received less than half of what he earned in each of the previous reporting periods. By quarter, his employers reported his income as follows:

⁶ Exh. 5.

⁷ The facts are taken from Mr. M.’s testimony unless another source is cited.

⁸ Exh. 8.

1 st Quarter	\$12,744
2 nd Quarter	\$13,370
3 rd Quarter	\$13,670
4 th Quarter	<u>\$ 5,933¹⁰</u>
Total	\$45,717

Thus, a child support amount calculated from Mr. M.'s actual 2008 income equals \$527 per month.¹¹ Had he remained at TIC for all of 2008, Mr. M. likely would have earned \$53,045.¹² Using CSSD's online child support calculator, a support amount calculated from that higher annual income figure equals \$691 per month.¹³

One can illustrate the impact of Mr. M.'s change in employment on his ability to support R. by estimating his current annual income and making a child support calculation from it. Wages of \$9.50 paid for full-time work would yield annual income of approximately \$19,760.¹⁴ Again, using CSSD's online child support calculator, a support amount calculated from this annual income estimate equals \$283 per month.¹⁵ This is \$408 per month less than the support amount calculated from Mr. M.'s estimated income had he remained at TIC.

Ms. T. and her husband are currently in the process of getting a divorce. She earns \$19 per hour and testified that over the last year she had net income of \$2,500 per month. However, her bills exceed her earnings by \$300-\$400 per month, so Ms. T. had to cash out a 401(k) to make ends meet. R. plays hockey and is active in Boy Scouts and a youth group.

III. Discussion

Modification of child support orders may be made 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

⁹ Exh. 7 at pg. 1.

¹⁰ *Id.*

¹¹ *See* Attachment A.

¹² This estimate is reached by taking the average of the first three quarters and multiplying the result times four quarters to arrive at estimated annual income. The math is as follows: $(\$12,744 + \$13,370 + \$13,670) = \$39,784 \div 3 = \$13,261.33 \times 4 = \$53,045.33$.

¹³ <https://webapp.state.ak.us/cssd/guidelinecalc.jsp>

¹⁴ $\$9.50 \times 2080 \text{ hours} = \$19,760$.

¹⁵ <https://webapp.state.ak.us/cssd/guidelinecalc.jsp>

¹⁶ AS 25.27.190(e).

circumstances has occurred and the order may be modified. The person requesting the hearing, in this case, Mr. M., has the burden of proving that CSSD's Modified Administrative Child Support and Medical Support Order is incorrect.¹⁷

Mr. M.'s prior child support order was for \$50 per month, so anything over \$57.50 per month would justify a modification in his case.¹⁸ Pursuant to the petition for modification, CSSD calculated his modified child support at \$611 per month, based on an extrapolation of his 2008 income at TIC *for all four quarters*. This calculation was performed on March 16, 2009,¹⁹ and CSSD may not yet have had Mr. M.'s fourth quarter income report, so extrapolating his income to include another quarter of earnings from the same employment was correct. However, if the agency had access to the fourth quarter information, the modified child support calculation should have been based on Mr. M.'s actual 2008 income, not an extrapolated figure.²⁰

The evidence in this case shows that in 2008, when Ms. T. requested a modification of support, Mr. M.'s actual annual income was \$45,717. This income figure supports a child support calculation of \$527 per month. Mr. M.'s current estimated income of \$19,760 yields a support amount of \$283 per month. Mr. M.'s appeal indicated that the \$60 per month CSSD was already collecting put too great a strain on the family.²¹

A parent is obligated both by statute and at common law to support his or her children.²² 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." The Obligor has the burden of proving his or her earning capacity.²³ If a parent is found to be voluntarily and unreasonably unemployed or underemployed, the child support amount may be calculated from the parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."²⁴

In cases in which CSSD is claiming voluntary unemployment or underemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary

17 15 AAC 05.030(h).

18 $\$50 \times 1.15 = \57.50 .

19 See Exh. 5 at pg. 2, at the top left-hand side of the page.

20 See *Duffus v. Duffus*, 72 P.3d 313, 321 (Alaska 2003).

21 See Exh. 5 at pg. 1.

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

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

24 Civil Rule 90.3(a)(4).

conduct “for the purpose of becoming or remaining unemployed.”²⁵ It is also necessary to determine whether the parent’s unemployment or underemployment is unreasonable. An integral part of the analysis is whether the parent’s lack of employment is a result of “economic factors,” as in being laid off, or of “purely personal choices.”²⁶ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.²⁷

The Alaska Supreme Court further explained the essence of the analysis in *Beaudoin v. Beaudoin*²⁸ by stating that “the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.” An obligor parent is free to change jobs and careers, but the custodial parent and child should not have to finance that change.²⁹ The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income.”³⁰

Based on the “totality of the circumstances,” Mr. M. is voluntarily and unreasonably underemployed. It is voluntary because he quit his job with TIC. It is unreasonable because he did it at the end of 2008, when the economy was clearly heading into a recession and Mr. M. and his wife were expecting a child. Further, Mr. M. is so committed to his current job that he refuses to even consider trying to find work that pays more. Mr. M.’s loyalty to the C. C. is laudable, but his son R. should not have to finance his choices. Mr. M. may need to find additional part-time work or find another way to make ends meet.

IV. Conclusion

Mr. M. did not meet his burden of proving by a preponderance of the evidence that CSSD’s Modified Administrative Child Support and Medical Support Order was incorrect. Mr. M. is voluntarily and unreasonably underemployed and his child support should be calculated at \$527 per month, which is derived from his actual income during 2008, when the modification was requested.

²⁵ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

²⁶ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²⁷ *Kowalski*, 806 P.2d at 1371.

²⁸ 24 P.3d 523 (Alaska 2001).

²⁹ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

³⁰ Civil Rule 90.3, Commentary III.C.

V. Child Support Order

- CSSD's March 16, 2009, Modified Administrative Child Support and Medical Support Order is affirmed, with one slight adjustment: the modified ongoing child support amount is set at \$527 per month, effective November 1, 2008,³¹ and ongoing.

DATED this 24th day of June, 2009.

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 17th day of July, 2009.

By: Signed _____
Signature
Jerry Burnett _____
Name
Deputy Director _____
Title

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

³¹ A modification is effective beginning the month after the parties are served with notice that a modification has been requested. 15 AAC 125.321(d). CSSD sent the parties a notice of modification on October 15, 2008. Exh. 3.