

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

IN THE MATTER OF:)

H. S.)

OAH No. 09-0408-CSS

CSSD No. 001106639

DECISION AND ORDER

I. Introduction and Procedural Background

The Obligor, H. S., challenged a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on July 30, 2009. Effective February 1, 2009, this order increased Mr. S.’ monthly child support obligation to \$487 from \$629 per month. Mr. S. appealed, arguing that he cannot afford this increase because his hours have been reduced and there are other children in his home. The Custodian is T. B. The Obligee child is Z., who is eight years old.

A hearing was held on September 10, 2009. Mr. S. participated in person; the custodian did not participate.¹ Erinn Brian, Child Support Specialist, represented CSSD in person. In its post-hearing brief CSSD provided several calculations for child support based on alternative annual income figures. CSSD also submitted an Affidavit of Department of Labor Records purporting to contain reported earnings for Mr. S. However, upon closer examination it became apparent that there were discrepancies between the income reported on a pay stub provided by Mr. S. and the income figures contained in CSSD’s affidavit. Also, CSSD offered four alternative child support calculations resulting in four monthly child support obligations but it failed to provide any rationale as to which calculation was correct under Civil Rule 90.3. To provide an accurate evidentiary record, a supplemental hearing was held on November 9, 2009. Ms. B. and Ms. Brian participated in person. Mr. S. participated by telephone.

Based on the record and after due deliberation, Mr. S.’ child support is modified to \$580 per month for one child, effective February 1, 2009; and further modified to \$700 per month, effective January 1, 2010.

¹ Ms. B. was called at her phone number of record which was answered by voicemail.

II. Facts

A. Background

Mr. S.' child support obligation for Z. was set at \$487 per month in April 2007.² Ms. B. requested modification on December 17, 2008.³ On January 14, 2009, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order requesting current financial information.⁴ Mr. S.' did not respond. On July 30, 2009, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. S.' ongoing child support to \$629 per month, effective February 1, 2009.⁵ To calculate his modified child support, CSSD determined Mr. S.' 2009 income to be \$46,912.80. It arrived at this figure by taking Mr. S.' 2009 reported first quarter earnings and multiplying the amount by four, plus the Permanent Fund Dividend (PFD).⁶

Mr. S. appealed on August 11, 2009 requesting a hardship variance.⁷ He asserts that his work hours have been reduced and CSSD did not take into account the children he supports in his home.⁸

B. Material Facts

Mr. S. is employed by JKM G. C., LLC as a painter and drywall finisher. He has worked for the company for over 18 months. According to CSSD's affidavit, Mr. S. had reported earnings of \$50,069.96 during 2008 and \$24,353.50 during the first and second quarters of 2009.⁹

Mr. S. believes that because of the dramatic reduction in his hours he will earn less than the income amount used by CSSD. He provided a pay stub for the pay period from July 27, 2009 to August 2, 2009 that showed he worked 8 hours and his year to date earnings totaled

² Exh. 1 (effective March 1, 2007).

³ Exh. 2.

⁴ Exh. 3.

⁵ Exh. 4. The effective date of a modification is the first month after CSSD issues the notice that a petition for modification has been filed. 15 AAC 125.321(d).

⁶ Exh. 4 at 4, 6.

⁷ Although not phrased as such, Mr. S. claims that he cannot afford the increase in child support and he has several children in the house.

⁸ Exh. 5.

⁹ CSSD's Post-hearing brief reports an annual income of \$40,080.76 for 2008. However, when calculated using the income provided in Ms. Brian's Affidavit of Department Labor Records, Mr. S. has a reported income for 2008 totaling \$50,069.96. Exh. 10.

\$24,311.91 (31 weeks = 784.26 per week).¹⁰ A more recent a pay stub for the period ending September 6, 2009 showed Mr. S. worked 5.5 hours in that pay period and his year to date wages totaled \$27,323.28.¹¹ By affidavit, Ms. Brian reported that for the pay period ending September 18, 2009 Mr. S. earned \$337.34, and that effective October 1, 2009, Mr. S.' employer anticipated that Mr. S. would be back working full time (40 hours per week).¹² At the supplemental hearing Mr. S. confirmed that he was now working full time earning \$25 per hour. He testified that he should earn \$48,000 by the end of 2009 but he cannot be sure.

Mr. S. lives with his fiancée, A. S., who is a stay at home mom. He has custody of two children ages three and four who live in the home. He also has custody of a 17 year-old son from a prior relationship. However, his son is not living with him. Mr. S. does not provide financial support to his son but is responsible for medical bills associated with a recent gunshot wound.¹³

Mr. S. reported regular monthly expenses of \$895 for rent; \$500 for food; \$43.34 for electricity; \$113 for telephone and cable service; \$50 for a cell phone; \$230 for vehicle gasoline and maintenance; \$84 for vehicle insurance; \$303 for entertainment and personal care items including tobacco; and \$64,000 for medical expenses associated with his son's gunshot wound.¹⁴ Mr. S. submitted only one bill for medical expenses totaling \$6,247.¹⁵ He explained that he has no payment plan established for this bill and pays when he can. Excluding any payment for medical expenses, Mr. S.' monthly expenses total \$2,218.34 per month.

III. Discussion

Mr. S. has requested a hardship variance. Before his request can be considered it must be determined what his gross income and monthly child support obligation would be without a variance for the period in question. It is from this starting point that Mr. S.' request for hardship will be analyzed.

¹⁰ Exh. 5 at 3.
¹¹ Exh. 7.
¹² Exh. 9.
¹³ Exh. 8 at 1.
¹⁴ Exh. 8 at 1.
¹⁵ Exh. 8 at 2.

A. *Income for Purposes of Child Support Calculations.*

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 15% different than the previous order, the Rule assumes a material change in circumstances has occurred and the support amount may be modified.¹⁷ A parent is obligated both by statute and at common law to support his or her children.¹⁸

When calculating child support, the obligor’s annual gross income must be established. Typically, child support determinations calculated under Civil Rule 90.3 from an obligor’s actual income figures are presumed to be correct.

As evidence of Mr. S.’ actual income, CSSD has submitted an Affidavit of Department of Labor Records. Mr. S. has submitted several pay stubs that call into question the accuracy of the income figures set forth in CSSD’s affidavit. Specifically, Mr. S.’ pay stub reveals that as of August 2, 2009, (third quarter 2009) Mr. S. earned \$24,311.91.¹⁹ This is \$41.59 less than what was reported for the first and second quarter earnings in 2009 as set forth in CSSD’s affidavit. CSSD was provided an opportunity to provide the record(s) relied upon in its affidavit but the division declined to do so. It offered no explanation for the discrepancy nor does it challenge the reliability of Mr. S.’ pay stub. Therefore, the more reliable evidence of actual earnings is the income reported on Mr. S.’ pay stubs. They show that Mr. S. earned \$27,323.28 as of September 6, 2009.

Mr. S. is paid weekly.²⁰ For the pay period ending September 6, 2009 his gross earnings totaled \$146.22. For the pay period ending September 18, 2009 Mr. S.’ gross earnings totaled \$337.34.²¹ No income information was provided for the intervening week or the remaining two weeks of September. To calculate income for those three weeks it is reasonable to average the two weeks of reported income in September. This results in average gross weekly earnings of \$241.78.²² It is undisputed that Mr. S. returned to a 40 hour per week schedule October 1. For

¹⁶ AS 25.27.190(e).

¹⁷ Civil Rule 90.3(h).

¹⁸ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

¹⁹ Exh. 5 at 3.

²⁰ His pay stub is for the pay period from August 31, 2009 to September 6, 2009. Therefore it is reasonable to conclude that Mr. S. is paid on a weekly basis.

²¹ Exh. 9 (Affidavit of Public Assistance).

²² $\$146.22 + 337.34 = 483.56$; $\$483.56/2 = \241.78 average earnings per week.

the remaining 13 weeks in 2009 Mr. S. is expected to earn \$13,000.²³ Using these income figures Mr. S.' estimated actual earnings for 2009 are \$41,385.96.²⁴

CSSD has offered that Mr. S.' income for purposes of child support should be \$48,707. It arrived at this figure by taking the two quarters of reported income set forth in it's affidavit and doubling the amount. Mr. S. agreed with CSSD and testified that he thought his actual 2009 gross earnings would be in the range of \$48,000. However the actual figures do not support such a finding. It is difficult to ascertain income in the middle of the year but \$41,385.96 is the best estimate of what Mr. S.' actual income is going to be in 2009.

Mr. S. is now working full time and there is no reason to believe he won't be earning full time wages of \$52,000 per year in 2010.²⁵ As reported in the Affidavit of Labor Records, Mr. S. had reported earnings totaling \$50,069.96 for 2008. Mr. S. did not submit evidence calling into question the accuracy of the income attributed to 2008. Considering Mr. S. earned \$50,069.96 in 2008 it does not seem unreasonable to base child support on anticipated earnings of \$52,000 per year effective January 1, 2010. If Mr. S.' actual income is less than \$52,000 per year he should request a modification review.

Mr. S. requested a deduction for supporting a prior child. To receive a deduction for a prior child, the child must be living with the parent.²⁶ Mr. S.' prior child does not live with him and he does not pay support for the child. Therefore, he is not entitled to the deduction for supporting a prior child. Additionally, this child will turn 18 on January 30, 2010, and except in very limited circumstances, Mr. S. would not be entitled to a deduction for the child after that date. His request to have his subsequent children considered is addressed below in association with his request for a hardship variance.

Mr. S. has established by a preponderance of the evidence that CSSD overstated his 2009 earnings and understated his anticipated 2010 earnings. When recalculated using Mr. S.' updated actual income for 2009 plus the PFD, his monthly child support obligation is \$580.²⁷ This amount is more than 15% higher than his prior obligation so modification is appropriate.²⁸

²³ 13 weeks x 40 hours = 520 hours; 520 hours x \$25 per hour = \$13,000.

²⁴ \$13,000 + \$337.34 + \$241.78 + \$241.78 + \$241.78 + \$27,323.28 = \$41,385.96.

²⁵ 2080 hours x \$25 = \$52,000.

²⁶ Civil Rule 90.3(a)(1)(D).

²⁷ Attachment A.

²⁸ Civil Rule 90.3(h).

Similarly, when recalculated for anticipated 2010 earnings, Mr. S.’ monthly child support obligation is \$700 per month.²⁹ This amount is more than a 15% increase from \$580 so modification in 2010 is also appropriate.³⁰ Therefore, effective February 1, 2009, Mr. S.’ monthly child support should be \$580; and effective January 1, 2010, his monthly child support obligation should be \$700.

B. *Mr. S. Did Not Establish Manifest Injustice Would Result If The Support Award Were Not Varied.*

A parent may obtain a reduction in the amount calculated, but only if he or she shows that “good cause” exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that “manifest injustice would result if the support award were not varied.”³¹ The presence of "unusual circumstances" in a particular case may be sufficient to establish “good cause” for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children^[32]

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).³³

In 2009, Mr. S.’ earned on average \$2,898.14 per month. His monthly expenses are \$2,218. Mr. S.’ monthly income exceeds his monthly expenses by \$680.14. Even with his 2009 child support obligation, Mr. S. monthly income exceeds his monthly expenses. In 2010, Mr. S. estimated monthly adjusted gross income is 3,498.93. Taking into consideration the increased monthly child support effective January 2010, Mr. S. monthly income will still exceed his monthly expenses.

Mr. S. argues that his subsequent children living in the home should be considered good cause to vary his child support obligation calculated in accordance with Civil Rule 90.3. However, subsequent children are not considered for purposes of calculating child support unless

²⁹ Attachment B.
³⁰ Civil Rule 90.3(h).
³¹ Civil Rule 90.3(c).
³² Civil Rule 90.3(c)(1).
³³ See Civil Rule 90.3, Commentary VI.E.1.

the Obligor can establish that failure to vary the child support will cause a substantial hardship to the subsequent children.³⁴ Mr. S. has not offered evidence sufficient to support such a finding.

Therefore, based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. S. did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. There are no "unusual circumstances" present to warrant varying his child support calculated under Civil Rule 90.3 for Z.

IV. Conclusion

Mr. S. did establish by a preponderance of the evidence that the gross income figures used by CSSD were incorrect. When correctly calculated Mr. S.' child support should be modified to \$580 per month effective February 1, 2009 through December 2009; and further modified to \$700 per month effective January 1, 2010. He has not met his burden of proving by clear and convincing evidence that manifest injustice would result if his modified child support amount calculated under Civil Rule 90.3 were not varied.

V. Child Support Order

- The obligor's child support is modified to \$580 per month effective February 1, 2009; and further modified to \$700 per month effective January 1, 2010.
- All other provisions of CSSD's July 30, 2009, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 25th day of November, 2009.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

³⁴ 15 AAC 125.075(a)(2)(F); See Civil Rule 90.3, Commentary VI.B.2.

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 December, 2009.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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