

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

IN THE MATTER OF: )

M. D. F. )

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OAH No. 09-0455-CSS

CSSD No. 001057763

**DECISION AND ORDER**

**I. Introduction**

The Obligor, M. D. F., appeals a Notice of Denial of Modification Review that the Child Support Services Division (“CSSD”) issued in his case on July 23, 2009. The Obligee child is B., who is 13 years old.

The formal hearing was held on September 24, 2009. Mr. F. participated by telephone; the Custodian, E. I. K., appeared in person. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on September 24, 2009.

Based on the record and after due deliberation, Mr. F.’s child support is modified to \$50 per month, effective February 1, 2009, and ongoing.

**II. Facts**

**A. Background**

Mr. F.’s child support order for B. previously was set at \$375 per month in August 2007.<sup>1</sup> On December 15, 2008, Mr. F. requested modification of his child support order.<sup>2</sup> On January 6, 2009, CSSD issued a Notice of Petition for Modification of Administrative Support Order.<sup>3</sup> Mr. F. provided income affidavits.<sup>4</sup> On July 23, 2009, CSSD issued a Notice of Denial of Modification Review for the reason that Mr. F. did not provide income information.<sup>5</sup> On August 25, 2009, Mr. F. filed an appeal and requested a formal hearing, asserting he cut his hand and could not work, he did not have any income in 2008, and he had been incarcerated for a period of time.<sup>6</sup>

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1 Exh. 1.  
2 Exh. 2.  
3 Exh. 3.  
4 Exh. 4.  
5 Exh. 5.  
6 Exh. 6.

## **B. Material Facts**

Mr. F.'s child support obligation was set at \$375 per month in August 2007. At the time, he was self employed and was doing fairly well financially. However, Mr. F.'s circumstances have gone downhill since that time. In May 2008, Mr. F. seriously injured his left hand in an accident with a miter saw. His recovery lasted over six months and as a result he had to close his business. About that same time he also broke up with his fiancée. On September 28, 2008, Mr. F. was incarcerated on a probation violation and he remained in jail until May 2009. After his release, he was unable to find work, so he sold all of his tools and vehicles in order to support himself. Mr. F. even tried to obtain employment with former clients. Having been unsuccessful, his parents suggested that he return to their home in Idaho, which he did on July 16, 2009.

Currently, Mr. F. lives with his parents and performs odd jobs for them in exchange for room and board on their three-acre property located 11 miles out of the nearest town. There are few local employment opportunities; construction workers are being paid the minimum wage. Mr. F. has applied for at least three minimum-wage jobs in town but the fact that he is a convicted felon has not been well received by potential employers. His father has been laid off from his job with the federal government, so his mother is the only person in the household who is employed. Mr. F. occasionally performs odd jobs for other people in the community, but these services are not in demand because most everyone is fairly self-sufficient. At the time of the hearing, Mr. F. had been asked to help a friend of the family build a garage, but the obligor did not know how much he was going to be paid for that work. Mr. F. receives about \$200 per month in food stamps but he is not required to attend the local job assistance classes because he is considered to be working for his parents in exchange for room and board.

The custodian, Ms. K., is a single mother with three teenaged children. She receives \$100 per month for her other two children. Ms. K. stated during the hearing that she believes it is fair to adjust Mr. F.'s child support because of his incarceration.

At the end of the hearing, CSSD proposed that Mr. F.'s child support be modified to \$50 per month from the effective date of the modification request, February 1, 2009, through September 30, 2009. As of October 1, 2009, CSSD asserted that Mr. F. should be able to find minimum wage employment in Idaho that pays \$7.25 per hour and totals \$15,080 per year.<sup>7</sup>

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<sup>7</sup> See Exh. 7.

Based on this assumption, CSSD imputed that income figure to Mr. F. and from it calculated his child support at \$210 per month.<sup>8</sup> Mr. F. did not have a response to CSSD's proposal.

### III. Discussion

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”<sup>9</sup> The person who filed the appeal has the burden of proving that CSSD’s action, in this case, denying the request for a modification review, was incorrect.<sup>10</sup>

Civil Rule 90.3(a)(1) provides that a noncustodial parent’s child support obligation is to be calculated from his or her "total income from all sources." The obligor has the burden of proving his or her earning capacity.<sup>11</sup> Under certain circumstances, CSSD may impute income to an obligor parent.<sup>12</sup> However, the prerequisite for imputing income to an obligor is that CSSD must first make a finding that the parent is voluntarily and unreasonably unemployed or underemployed.<sup>13</sup> CSSD raised no argument that Mr. F. is voluntarily and unreasonably unemployed, nor did the division request that the administrative law judge make such a finding as a basis for imputing income to him. Rather, CSSD argued only that Mr. F. “should” be able to find work at the minimum wage. This is not a sufficient basis upon which to impute income.

An assertion of voluntary unemployment is a claim that the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed.”<sup>14</sup> If the parent is voluntarily unemployed, it is also necessary to determine whether the parent’s unemployment 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."<sup>15</sup> It is not necessary to prove the parent was purposefully avoiding child support or acting in bad faith.<sup>16</sup>

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*Id.*

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AS 25.27.190(e).

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15 AAC 05.030(h).

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

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Civil Rule 90.3(a)(4).

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The agency’s forms provide for a caseworker to check a box in the findings of fact section, but there is no such form in this case because CSSD denied the petition for modification and as a result there is no order to review.

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

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

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*Kowalski*, 806 P.2d at 1371.

Even if CSSD had argued that Mr. F. is voluntarily unemployed, the evidence does not support such a finding here. He has had a material change in circumstances since 2007 and as a result his child support obligation should be modified. Based on his actual income, Mr. F.'s modified child support should be set at the minimum of \$50 per month. As soon as he obtains employment, Mr. F.'s child support should be further modified to reflect his improved circumstances.

**IV. Conclusion**

Mr. F. met his burden of proving by a preponderance of the evidence that CSSD's Notice of Denial of Modification Review was incorrectly issued. He established "good cause and material change in circumstances" sufficient to modify his ongoing child support to \$50 per month, effective February 1, 2009. This amount should be adopted.

**V. Child Support Order**

- Mr. F.'s child support is modified to \$50 per month, effective February 1, 2009.<sup>17</sup>

DATED the 8th day of October, 2009.

By: Signed \_\_\_\_\_  
Kay L. Howard  
Administrative Law Judge

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<sup>17</sup> 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). In this case, CSSD issued the notice on January 6, 2009. Exh. 3.

**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 27th day of October, 2009.

By: Signed  
Signature  
Kay L. Howard  
Name  
Administrative Law Judge  
Title

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