

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NF,		: NO.15 – 21,474
	Petitioner	: PACSES NO. 647115638
		:
	vs.	:
		: DOMESTIC RELATIONS SECTION
DF,		:
	Respondent	: Exceptions

OPINION AND ORDER

Before the Court are Respondent’s exceptions to the Family Court Order of February 7, 2017. Argument on the exceptions was heard April 25, 2017.

The parties share physical custody of their two children equally and because Respondent was assessed a higher earning capacity than was Petitioner, Respondent was directed to pay child and spousal support to Petitioner. In his exceptions, Respondent contends the hearing officer erred in the assessment of both earning capacities, in failing to deviate and in continuing to award spousal support. Each of these issues will be addressed in turn.

Petitioner’s earning capacity, which is based on her current, new, employment rate of \$8.98 per hour for work as a housekeeper,¹ was imposed because the hearing officer found that Petitioner was “essentially starting over”. The earning capacity thus failed to consider Petitioner’s work history as a housekeeper, as well as evidence of wages available. Petitioner testified that during the marriage she had worked for a short time as a housecleaner earning about \$10.00 per hour, N.T., February 7, 2017, at page 74, and she also presented

¹ Previous to this new job, Petitioner had worked as an office manager earning \$12.00 per hour, but quit that job as she found it overwhelming.

the testimony of the Human Resources Manager at ADS, *Id.* at page 137, who testified that a recently-filled cleaning position paid \$12.00 per hour. Although that cleaning position was part-time (as is the position Petitioner recently took), the evidence shows that Petitioner could expect to earn \$10.00 to \$12.00 per hour working as a housekeeper/cleaner.

Respondent sought modification because his new employment pays only \$11.25 per hour and his support order was based on prior employment, which he lost for poor job performance, through no fault of his own, where he earned \$25.91 per hour. Rather than finding that Respondent was “essentially starting over”, however, and basing his earning capacity on his current employment, the hearing officer assessed him with an earning capacity of \$20.00 per hour, based on a finding that Respondent has the “skill set and experience needed for a position as a production supervisor which would pay \$22.00 to \$25.00 per hour.” This finding was based on a finding that “both parties seem to think that [Respondent] was a good candidate for the post”, the “post” being a job at ADS which had been open, which Petitioner had informed Respondent about, and which Respondent testified he had applied for but did not get. The hearing officer’s assessment seems to be based on her finding that Respondent did *not* apply for the job, but *that* finding is not supported by the record.

The Human Resources Director testified that Respondent did not submit an application for the position at issue, but she also testified that the plant manager told her that Respondent had inquired of him at one point whether the position was still available. *Id.* at page 136. Respondent testified that he had been submitting resumes to various recruiting offices and with respect to this particular position, that he *did* apply for the job and that when he inquired of the plant

manager, he was told that the recruiting office never sent ADS his resume. *Id.* at page 110. Thus, at best, the record supports a finding that Respondent did submit an application for the job to the recruiting office, and that that application was not forwarded to ADS. This factual circumstance should *not* be used to assess Respondent's earning capacity based on that one job, and, other than that job, there is no evidence in the record which supports an assessment of \$20.00 per hour.

What *is* in the record is evidence that ADS had job openings for entry level positions which pay \$14.90 per hour. Thus, Respondent could realistically be assessed at \$14.90 per hour, just as Petitioner could be assessed at \$12.00 per hour. The record also shows, however, that both parties have been required by circumstances outside their control to seek new employment, and the evidence respecting the *availability* of jobs for which either party is suited is no less bleak for one than for the other. Further, the evidence shows that both parties have been actively seeking work and have resorted to their current positions out of desperation.² It appears that they both will continue to seek more lucrative work, and thus the court believes that the support order should be based on their actual hourly incomes at this time.³

Respondent's allegation of error for failing to deviate is really centered on the situation created by the assessment of a much larger earning capacity for

² The hearing officer expressed "a concern" because Respondent's list of employers with whom he sought employment (Respondent's Exhibit #4) "does not include the contact information for the business, any indication of the type of employment he applied for with each company or any indication of whether resumes/applications were sent because of an actual job opening or simply because [Respondent] wanted to add the employer to the list of places to which he sent a resume." There is nothing in the record to suggest, however, that Respondent had been asked to prepare anything other than a list of places where he had sought employment, and therefore the lack of detail should not be used against him. It is noted in this regard that Petitioner merely testified to having submitted 15 to 20 applications, and did not even present a list.

³ The court agrees that both should be assessed with full-time capacities, even though both are working only part-time.

Respondent than for Petitioner. Since this factor is being removed from the equation, the court will not address the deviation argument.

Finally, with respect to the spousal support, Respondent had asked for the spousal support to be terminated by petition dated September 21, 2016, based on his assertions that “the Plaintiff is not conducting herself as a spouse and has committed grounds for divorce.” The hearing officer denied this petition on the basis that “no evidence or testimony was offered on the issue of the suspension of spousal support and/or the continued entitlement of NF to spousal support”. At the hearing on February 7, 2017, however, Petitioner testified that she “sometimes” spends half of the overnights in a month at her boyfriend’s house. This evidence of adultery certainly supports Respondent’s request to terminate the spousal support.

Accordingly, Respondent will be assessed an earning capacity of \$11.25 per hour for 40 hours per week, and using the same tax rate applied to Petitioner (15%), he is found to have a net earning capacity of \$1657.50 per month. Considering this capacity, and Petitioner’s capacity of \$1323.05, the parties have a combined total capacity of \$2980.55 per month. Under the guidelines, and applying the 20% reduction to Respondent’s percentage to consider the equal shared custody, Respondent’s obligation for two minor children would be \$361.44 per month, but must be reduced further to equalize the parties’ household incomes,⁴ to \$167.23 per month, effective the date of his petition, November 14, 2016. The spousal support will be terminated effective September 21, 2016 and therefore will not be modified.

⁴ In all cases in which the parties share custody equally and the support calculation results in the obligee receiving a larger share of the parties' combined income, then the court shall adjust the support obligation so that the combined income is allocated equally between the two households. Pa.R.C.P. 1910.16-4(c)(2).

ORDER

AND NOW, this 28th day of April 2017, for the foregoing reasons, the Order of February 7, 2017 is modified as follows:

- (1) Effective September 21, 2016, the spousal support is terminated.
- (2) Effective November 14, 2016, the child support is modified to \$167.23 per month, plus \$16.00 per month toward any arrearage.
- (3) Any overpayment shall be addressed administratively by the Domestic Relations Office.

As modified herein, the Order of February 7, 2017 is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Family Court
Domestic Relations Section
Melody Protasio, Esq.
Janice Yaw, Esq.
Gary Weber, Esq. (Lycoming Reporter)
Hon. Dudley Anderson