

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

IN THE MATTER OF)	OAH No. 10-0120-CSS
M. T.)	CSSD No. 001116097
_____)	

DECISION AND ORDER

I. Introduction

On June 2, 2010, a hearing was held to consider the appeal of M. T., to consider his child support obligation for his child O. P. C. W., the custodial parent, participated. Mr. T. also participated. The Child Support Services Division (Division) was represented by Erinn Brian, Child Support Services Specialist.

This case is an appeal of the Division’s Notice of Denial of Modification Review. The Denial of Modification Review denied Mr. T.’s request that the Division review his ongoing child support obligation for a downward modification. The Division denied the request because Mr. T. failed to timely provide his income information. This order was issued on January 15, 2010. After a hearing on this matter, the Division changed its position and argued that Mr. T.’s child support be increased to \$1,180 per month effective July 1, 2009.

The hearing was held by Administrative Law Judge Dale Whitney, but the appeal was re-assigned to Administrative Law Judge Mark T. Handley, who having reviewed the record in this case and after due deliberation, concludes that the Division’s original order denying modification review should be upheld. Mr. T.’s ongoing child support obligation for O. should remain at \$955 per month.

II. Facts

Mr. T. filed a request for modification on June 9, 2010.¹ The Division issued a Notice of Denial of Modification Review order on June 22, 2010.² With this notice, the Division included an order for Mr. T. to provide his income information by July 22, 2010.³ Mr. T. did not provide

¹ Exhibit 5.

² Exhibit 7.

³ Exhibit 7.

this information before the deadline.⁴ The Division issued a Notice of Denial of Modification Review issued on January 15, 2010.⁵ The Division denied Mr. T.'s request for modification review because the Division determined he did not timely provide his income information.⁶

Mr. T. requested a formal hearing.⁷ At the formal hearing, Mr. T. indicated that his primary concern was the amount of money that was being withheld from his paycheck. Some of the money that was being withheld however was being collected for arrears. At the hearing, Mr. T. and Ms. W. were also concerned about a second genetic test, which has now been completed. The results confirmed Mr. T.'s paternity of O.⁸

At the hearing, Mr. T. was given until May 10, 2010 to provide income information and medical records of any disabilities that prevent him from working full-time. The Division was given until May 19, 2010 to respond to the information provided by Mr. T..

Mr. T. timely filed the information requested on his income and his medical problems. The Division filed a post hearing brief. The Division's position is that Mr. T.'s ongoing child support should be modified upward, from \$955 per month to \$1,180 per month based on his current earnings. The Division argues that Mr. T.'s medical problems do not limit his ability to work full-time since he now has a full-time job.

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. T., has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.⁹ At the hearing, Mr. T. did not show by a preponderance of the evidence that the Division's order is incorrect.¹⁰ The Division has the authority to decline to complete its review of a request for modification when, as in this case, the party requesting the review does not timely provide all of the required income information.¹¹ Since Mr. T. did not show that he did not timely provide the information the Division requested, Mr. T. failed to meet his burden of proof to show that the

⁴ Recording of Hearing.

⁵ Exhibit 11.

⁶ Exhibit 11.

⁷ Exhibit 13.

⁸ Recording of Hearing.

⁹ Alaska Regulation 15 AAC 05.030(h).

¹⁰ Alaska Regulation 15 AAC 05.030(h).

Division's order was incorrect.¹²

As explained at the hearing, Mr. T. must go to court if he wishes to appeal the Division's collections and enforcement actions on his order. The genetic testing issues raised by Mr. T. at the hearing appear to have been resolved.

At the hearing, the discussion quickly moved past the issue of whether Mr. T. provided the information timely to the Division. Mr. T. indicated that he had provided what he thought was required after the Division issued the Denial of Modification Review order on June 22, 2010. This however, would have been too late. In fact, it shows that the information was not timely filed.

An obligor must show that information was timely filed in order to overturn a denial of modification review because if the information was not timely provided, the Division's denial was correctly issued. One reason for this strict deadline is that the modification would generally take effect the beginning the month that the petition was issued. If the modification process takes too long due to the failure of the party who requests the modification to provide information, the modification can effectively become retroactive. Retroactive modifications are prohibited by federal law.

When modification review is denied due a party's failure to timely provide income information, either party can simply request a modification again. When the new petition is filed, the effective date of the modification will be moved forward to that date, which solves the problem of an effective retroactive modification through a protracted modification process.

Sometimes when modification review is denied due to a failure to timely provide income information, the parties all agree to waive the issue of the modification review denial and take up the modification during a formal hearing. At the hearing on June 2, 2010, the Division expressed its willingness to consider income and disability information from Mr. T. and proceed with a modification. The parties then proceeded as though the denial of review would be overturned, the modification petition would remain in effect and Mr. T.'s ongoing support would be subject

¹¹ Alaska Regulation 15 AAC 125.316(e).

¹² Recording of Hearing & Alaska Regulation 15 AAC 125.316(e).

to modification. After the hearing, Mr. T. provided income and disability information. The Division reviewed this information and proposed an upward modification.

However, it was not explained to Mr. T. and Ms. W. that an upward modification was a possible outcome if the modification was taken up at the formal hearing. It was also not explained to Mr. T. and Ms. W. that one result of ignoring the denial of modification review and taking up the modification at the formal hearing is that the effective date of the modification would be July 1, 2009, absent a showing of good cause to move the effective date forward. In short, it is not clear that all the parties knowingly waived their right to have the denial of modification affirmed, or were adequately informed of the consequences of such a waiver. Furthermore the Division's calculations and arguments in support of an upward modification were not submitted until after the formal hearing. This was not due to any fault of the Division, it is simply due to the way that this case progressed. However, in order to avoid due process issues raised by consideration of evidence and arguments that were not anticipated at the hearing, it would be necessary to schedule an additional hearing. This would further extend a protracted modification process that was properly terminated in accordance with the Division's regulations.

Given the fact that almost a year has passed since the petition for modification was issued based on Mr. T.'s request for a downward modification, it would not be appropriate to modify the ongoing support upward based on information that was filed after the formal hearing on the appeal of the Division's denial of modification review. At this point, if any of the parties still want to have ongoing child support modified, they should initiate a new modification proceeding.

IV. Conclusion

I conclude that the Division correctly denied Mr. T.'s request modification review. Mr. T.'s ongoing child support should remain at \$955 per month until a new modification proceeding is initiated.

V. Child Support Order

The Division’s Notice of Denial of Modification Review issued on January 15, 2010, is affirmed.

DATED this 16th day of June, 2010.

By: Signed
Mark T. Handley
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 13th day of July, 2010

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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