

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

IN THE MATTER OF:)
)
U D. K)
)
_____) OAH No. 10-0503-CSS
CSSD Case No. 001099648

DECISION AND ORDER

I. Introduction

This case concerns the child support obligation of U D. K for his children F S. K and E G. K. The custodian of record is C L X.

The Child Support Services Division issued a modified administrative child support order on March 27, 2002, setting ongoing support for two children at \$488.35 per month, effective February 1, 2002.¹ On June 8, 2010, Mr. K filed a request for modification of the order.² On June 17, the division issued notice of a petition for modification and requested income information from Mr. K.³ On August 17, the division declined to proceed with modification review on the ground that Mr. K had failed to provide income information.⁴ Mr. K appealed.⁵

The assigned administrative law judge conducted telephonic hearings on October 25 and December 30. Mr. K and Ms. X participated and Erinn Brian represented the division.

Because the division initiated modification review as provided in 15 AAC 125.316(c), under 15 AAC 125.321(a) the division must review the order and issue a written review decision that grants or denies the petition for modification. The decision to decline to complete modification review is therefore reversed and this case is remanded to the division for completion of modification review.

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¹ Ex. 1, p. 1.
² Ex. 2.
³ The notice is dated June 16, but was mailed to Mr. K on June 17. Ex. 3.
⁴ Ex. 4, p. 2.
⁵ Ex. 5.

II. Facts

A. Factual and Procedural History

U K is the father of eleven children, nine of whom are the subject of four separate child support orders issued by the Child Support Services Division,⁶ and two of whom live with him and his current wife.⁷ Mr. K's oldest child emancipated in 2007; as of October, 2010, Mr. K owed \$46,573.74 in past due child support and interest for that child.⁸ His next four children, all older than F and E, and another child younger than them, are subject to CSSD No. 001082339. Mr. K is subject to a monthly support obligation of \$729 for those children, with total arrears as of October, 2010 of \$96,512.61.⁹ The administrative order in this case, CSSD No. 001099648, was established for F in 1999; it was modified to add E in 2002, with the support obligation for the two children set at \$488.35 per month.¹⁰ As of October, 2010, the total arrears on the order were \$67,114.33.¹¹ Another child of Mr. K, younger than F and E, is the subject of a closed administrative case.¹²

B. 2010 Request for Modification

On April 26, 2010, Mr. K filed for bankruptcy.¹³ A meeting of creditors was scheduled for June 8, with a hearing on confirmation of his bankruptcy plan set for July 14 and proof of claims to be filed by September 6. On June 1, Mr. K's bankruptcy attorney provided the bankruptcy court with copies of his 2006-2009 tax returns (which had been prepared by paid third parties on May 25).

On June 8, 2010, Mr. K submitted a request for modification of his two active administrative support orders, CSSD Nos. 001082339 and 1099648.¹⁴ On June 17, in response to the request in CSSD No. 1099648, the division sent Mr. K a notice of a petition for modification of the support order in that case, stating "[w]e have begun to

⁶ CSSD's Notice of Appeal Status (November 2, 2010) (hereinafter, Notice of Status). Mr. K asserts that he is the father of 11 children. K Supp. Ex. 2 (January 10, 2011).

⁷ See K 2008, 2009 Form 1040, page 1, lines 3, 6(c).

⁸ CSSD No. 001078041. Notice of Status; Ex. 7.

⁹ Notice of Status; Ex. 8, p. 3.

¹⁰ Ex. 1.

¹¹ Ex. 6.

¹² Notice of Status. The custodial parent withdrew from services in 2006.

¹³ No. 10-00000-rbk (Bankruptcy, W.D. Texas).

¹⁴ Ex. 2.

review your child support order” and requesting that he provide income information.¹⁵ Mr. K failed to submit income information, and on August 17, the division notified Mr. K of the denial of modification review, referencing 15 AAC 125.321 and stating “[w]e will not go forward with the modification” on the grounds that Mr. K had not submitted a child support affidavit and income documentation.¹⁶

III. Discussion

A. The Decision Appealed Was Issued Under 15 AAC 125.321

Both the form notice of denial of modification review that was provided to Mr. K and the form notice of appeal that he submitted specifically reference 15 AAC 125.321 as the basis for decision made and for the appeal.¹⁷ Because the decision that has been appealed was issued under 15 AAC 125.321,¹⁸ the question on appeal is whether that decision is consistent with 15 AAC 125.321, not whether it was an abuse of discretion under 15 AAC 125.316(e).¹⁹

B. Modification Review May Not Be Denied Under 15 AAC 125.321

15 AAC 125.321(a) provides:

(a) If a support order for which review has been initiated under 15 AAC 125.316 was issued by [the agency] or registered with the agency for modification, the agency will review the order upon receipt of the required financial and medical information or upon the expiration of the time for providing the information under 15 AAC 125.040, whichever occurs first. Based on that review, the agency will issue a written review decision. The agency’s written review decision must grant or deny the petition for modification. ...[emphasis added]

Quite plainly, subsection (a) mandates that once review has been initiated under 15 AAC 125.316, the division will not only review the order, but will issue a written decision granting or denying the petition for modification. To review the order and issue a written decision granting or denying a petition for modification is to complete modification

¹⁵ Ex. 3, pp. 1-3 (CSSD No. 001099648).

¹⁶ Ex. 4.

¹⁷ Ex. 4, Ex. 5.

¹⁸ Because this appeal is taken from a decision issued under 15 AAC 125.321, it is not necessary to decide whether Mr. K would have had a right to a formal hearing if the division had denied modification review under 15 AAC 125.316(e). *See* 15 AAC 05.025 (list of administrative decisions that are final for purposes of appeal to formal hearing does not include 15 AAC 125.316).

¹⁹ On appeal from a decision to decline to complete modification review under 15 AAC 125.316(e), the issue on appeal is whether the division abused its discretion under that regulation. *See, e.g., In Re K.J.N.*, OAH No. 08-0222-CSS, at 2, note 8 (Commissioner of Revenue 2008); *In Re J.L.A.*, at 3, note 17, OAH No. 07-0390-CSS (Commissioner of Revenue 2007).

review. Nothing in 15 AAC 125.321 provides authority for the division, after it has initiated modification review under 15 AAC 125.316, to decline to complete the review on the ground that the party requesting modification has failed to provide requested financial information. Rather, in that situation subsection (a) states that the division will review the order “upon the expiration of the time for providing the information.”

Thus, the critical question raised in this appeal is whether the division initiated modification review under 15 AAC 125.316 before it declined to complete the review. 15 AAC 125.316(a) provides that the division “may initiate a review” of a support order issued by the division at the request of a parent who is subject to the order or a child support agency. 15 AAC 125.316(c) and (e) provide:

(c) Upon initiation of review under (a)...of this section, the [division] will send a notice of petition for modification and a request or an order for production of financial and medical information under 15 AAC 125.040...to each parent subject to the order....

...

(e) Before initiating a review in response to a request under (a)(3) of this section, the [division] may require the party that asks for the review to provide evidence that the child support award as calculated under 15 AAC 125.070 and the child support guidelines of Alaska Rule of Civil Procedure 90.3 is more than 15 percent greater or less than the support obligation that is set out in the current support order. If the party fails to provide that evidence, the [division] may decline to complete the review. The agency will not require a party to provide proof of a 15-percent change under this section if more than three years has elapsed since the support order was issued or modified.^[20]

Subsections (c) and (e) establish a two step process for modification review following a request by a parent. The steps are set out in the regulation in the reverse order from which they occur: that is, the first step is set out in subsection (e), and the second step is set out in subsection (c). First, as stated in subsection (e), before initiating

²⁰ The reference to paragraph (a)(3) is problematic, because paragraph (a)(3) was repealed in 2005. 15 AAC 125.316, am. 4/1/2005, Register 173. Arguably, because there is no longer any paragraph (3), section (e) no longer provides authority for the division to decline to complete review. However, such a reading would render all of subsection (e) superfluous. Treating only the reference to paragraph (3) as superfluous, subsection (e) would provide authority to decline to complete review under the same circumstances that it had prior to the 2005 amendment: namely, when a parent (or support agency) fails to provide evidence requested before review is initiated. See 15 AAC 125.316(e), am. 11/30/2002, Register 164. Consistent with that reasoning, decisions issued by the commissioner have routinely treated subsection (e) as providing the division with continued authority to decline to complete modification review. See, e.g., In Re L.V.A., OAH No. 10-0616-CSS (Commissioner of Revenue 2011); In Re P.J.B., OAH No. 07-0315-CSS (Commissioner of Revenue 2007); In Re R.C.S., OAH No. 07-0102-CSS (Commissioner of Revenue 2007).

modification review, the agency may (within three years of the date the order was issued or modified) require the requesting party to provide unspecified “evidence” that the support obligation has changed by at least 15%. If the party fails to provide that “evidence”, the division may decline to complete the review. Second, as stated in subsection (c), upon initiating review, the division will send out to each parent a notice of petition and request for information under 15 AAC 125.040.

In this case, the division did not follow the procedures set out in 15 AAC 125.316(e): it did not send a request to the party who had requested modification to provide evidence showing grounds for modification. Rather, the division followed the procedure described in 15 AAC 125.316(c): it sent out notice of a petition for modification and it requested the information specified in 15 AAC 125.040 from both parties.²¹ Under the plain language of 15 AAC 125.316(c), that action constituted the *de jure* initiation of the modification review process. Moreover, the notice that was sent to Mr. K on its face specifically states, “[w]e have begun the modification review process,” a statement that is inconsistent with non-initiation of that process and that demonstrates the *de facto* initiation of modification review. Under the circumstances, the division cannot reasonably be deemed not to have initiated modification review.

Because the division had initiated modification review using the procedures stated in 15 AAC 125.316(c), under 15 AAC 125.321(a) it lacked discretion to decline to complete modification review under 15 AAC 125.316(e). To read the division’s authority under 15 AAC 125.316(e) to decline to complete modification review as continuing after review has been initiated would be inconsistent with the plain language of 15 AAC 125.321(a), which expressly requires that the division review the order no later than “upon expiration of the time for providing the information [requested] under 15 AAC 125.040” and thus specifically provides for modification review to be completed even if income information was not timely provided in response to a notice of petition for modification. More fundamentally, in this case there is no evidence that the division made any request for financial information before it initiated modification review, which is what 15 AAC 125.316(e) provides must occur if the division is to decline to complete

²¹ The notice of petition for modification, sent to both parties, included a request for the submission of the evidence listed in 15 AAC 125.040(b) and (c). *See* Ex. 3, pp. 1, 3.

modification review for failure to provide income information.²² The plain language of 15 AAC 125.321(a) mandates that the division complete modification review when it has elected to initiate review under 15 AAC 125.321(c), as in this case, rather than to request evidence under 15 AAC 125.316(e) before initiating review. Accordingly, the division's decision to decline to complete modification review in this case must be reversed.

ORDER

1. The denial of modification review is **REVERSED**.
2. This case is remanded to the division to conduct modification review. The Office of Administrative Hearings does not retain jurisdiction. A party may appeal the division's action at the conclusion of modification review.

DATED: May 20, 2011

Signed

Andrew M. Hemenway
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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 8th day of June, 2011.

By: Signed

Signature
Andrew M. Hemenway

Name
Administrative Law Judge

Title

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

²² See note 17, *supra*. The first sentence of 15 AAC 125.316(e) states that the division may, before initiating modification review, require a party to "provide evidence" of grounds for modification. The second sentence provides authority to decline to complete modification review if the party requesting modification "fails to provide that evidence," *i.e.*, the evidence referenced in the first sentence: evidence requested before the division initiated modification review.