



Mr. S. did not provide income information. On January 31, 2007, the division notified Mr. S. that it had denied modification review, citing 15 AAC 125.321.<sup>5</sup> The notice of denial states, “We will not go forward with the modification [because] income documentation was not submitted...as required under Alaska Statute 25.27.190.”<sup>6</sup>

On February 23, 2007, Ms. A. sent in the appeal form that had accompanied the notice of denial of modification review.<sup>7</sup> The form states that the appeal is “[i]n accordance with AS 25.27.190 and 15 AAC 125.321”; Ms. A.’s written reasons for appealing were: “Who’s modification are we doing? I don’t understand. You can call the number below and leave a message.”

The division treated Ms. A.’s submission as an appeal and referred the matter to the Office of Administrative Hearings. Prior to the hearing, the division submitted a prehearing brief purporting to revoke its prior denial of modification review and asking that the support order be modified, based on income information it had obtained from records at the Department of Labor.<sup>8</sup> At the hearing the division objected to a remand for purposes of modification review.

### **III. Discussion**

A party has a right to a formal hearing when, after conducting a modification review,<sup>9</sup> the division issues a written decision granting or denying modification.<sup>10</sup> But not every request for modification review leads to a decision to grant or deny modification. The division has discretion to decline to proceed with modification review when the party requesting review fails to submit evidence that there has been a change of 15% or more in the amount of the support obligation.<sup>11</sup>

In this case, Mr. S. failed to submit income information to support his request for modification, and the division exercised its discretion under 15 AAC 125.316(e) to

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<sup>5</sup> Ex. 3.

<sup>6</sup> AS 25.27.190(b) states in part: “The agency shall grant a hearing upon a petition under [AS 25.27.190(a)] if affidavits submitted with the petition make a showing of good cause and material change in circumstances...”.

<sup>7</sup> Ex. 4.

<sup>8</sup> A copy of the prehearing brief was sent to Mr. S.. The brief summarizes the information contained in the Department of Labor records, but no documentary evidence of those records was submitted.

<sup>9</sup> 15 AAC 125.321(a).

<sup>10</sup> 15 AAC 125.321(c).

<sup>11</sup> 15 AAC 125.316(e).

decline to complete a modification review. Because the division did not complete a modification review, it did not make a decision whether to grant or deny modification. The issue on appeal from the denial of modification review is whether the agency properly exercised its discretion not to complete a modification review.<sup>12</sup>

Ms. A. filed an appeal form that neither stated any objection nor requested any relief: rather, she asked for an explanation of what the division was doing. The division treated this as an appeal by Ms. A. Assuming that Ms. A. was entitled to appeal the denial of modification review,<sup>13</sup> as the appealing party she had the burden of proof of facts by a preponderance of the evidence,<sup>14</sup> and had to show that the division's action was incorrect.<sup>15</sup>

To carry her burden of proof, Ms. A. needed to show that Mr. S. presented evidence of a 15% change in his income: he did not, and neither she nor the division asserts that he did. To the contrary, the division denied modification review precisely because Mr. S. did not submit income information. The division's decision to deny modification review was not erroneous.

The division's prehearing brief purports to revoke the prior denial of modification review, and asks for entry of an order modifying the child support order to reflect evidence that the division obtained after it had declined to complete a modification review. But the notice of denial of modification review specifically informs Mr. S. that a formal hearing would occur only after the division had completed a modification

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<sup>12</sup> See, e.g., In Re Headd, OAH No. 06-0670 (November 14, 2006).

<sup>13</sup> Whether either Mr. S. or Ms. A. was entitled to an administrative appeal and formal hearing concerning the denial of modification review is questionable. 15 AAC 125.316 is not included in the list of administrative actions that are final for purposes of appeal to a formal hearing. See 15 AAC 05.025; compare 15 AAC 125.326(b), (d) (denial of request for administrative review of judicial support order is not subject to further administrative appeal, but may be appealed to the superior court). Furthermore, 15 AAC 05.010(i) specifically provides that to appeal a child support matter, the agency must first have issued a decision under one of the specified administrative regulations. 15 AAC 125.316 is not on that list, but 15 AAC 125.321 is.

The notice of denial of modification review, which embodies the decision from which this appeal was taken, references 15 AAC 125.321. However, a decision under 15 AAC 125.321 must, pursuant to 15 AAC 125.321(a), include appropriate findings under 15 AAC 125.090. The notice of denial of modification review did not contain findings under 15 AAC 125.090, because the merits of the request for modification were not the subject of the decision to deny modification review. Denial of modification review is authorized by 15 AAC 125.316(e), not by 15 AAC 125.321.

<sup>14</sup> 2 AAC 64.290(e).

<sup>15</sup> 15 AAC 05.030(h).

review.<sup>16</sup> Likewise, the division's regulations specifically provide that a person who requests modification is entitled to a formal hearing after the division issues its decision granting or denying modification.<sup>17</sup> Finally, the division's regulations specifically provide that a child support order may not be modified until after a modification review has been conducted.<sup>18</sup> Under these provisions of law, a formal hearing is not a substitute for modification review. If the party who requested modification has not waived the procedures set out in the division's regulations and agreed to a hearing on the merits following the denial of modification review, the proper procedure is to either remand the case for modification review, or to affirm or reverse the division's decision not to complete modification review.<sup>19</sup>

The division had discretion to complete modification review even in the absence of information from the requesting party. In this case, after the division denied modification review the division independently obtained wage information indicating that modification is appropriate, and it decided that its earlier denial of modification review was an error. However, at the hearing the division objected to a remand in order to complete the modification review process and asked that the merits of the request for modification be taken up at the formal hearing. For the reasons previously stated, the division's request will be denied because it is inconsistent with the applicable regulations and Mr. S., who initially requested modification, has not waived his right to proceed in accordance with law. Assuming that the wage information the division has obtained is correct, it appears that it would not be in the best interests of the child to forego modification review and that a remand is appropriate. If Office of Administrative Hearings retained jurisdiction in the order of remand, there would be no need for either party to file an appeal following the completion of the modification review, and the

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<sup>16</sup> Ex. 3.

<sup>17</sup> 15 AAC 125.321(c).

<sup>18</sup> 15 AAC 125.321(a) provides: "[T]he agency will review the order upon receipt of the required financial and medical information.... Based on that review, the agency will issue a written decision. The agency's written review decision must grant or deny the petition for modification. If the agency grants the petition for modification, the decision must also set out the modified support amount and the effective date of the modification. In addition, the agency's written review decision must include the findings that are required by 15 AAC 125.090."

<sup>19</sup> Truncating these procedures could, depending on the facts, result in a denial of due process of law. *See, e.g., Bostic v. State, Department of Revenue, Child Support Enforcement Division*, 968 P.2d 564 (Alaska 1998).

formal hearing in this case could simply be rescheduled.<sup>20</sup> However, the administrative law judge's authority to remand the case is limited to cases in which the parties stipulate to a remand, or a party requests remand by motion,<sup>21</sup> and in this case the division has objected to a remand.

#### **IV. Conclusion**

Ms. A. has not shown that the division's decision to deny modification review was erroneous. The division may, by proposed action, request remand if modification is deemed in the best interests of the child.

#### **DECISION AND ORDER**

1. This division's decision to deny modification review is AFFIRMED.
2. R. S.'s child support order remains at \$50 per month.

DATED: April 6, 2007.

Signed  
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Andrew M. Hemenway  
Administrative Law Judge

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<sup>20</sup> See 2 AAC 64.340(d).

<sup>21</sup> *Id.*

### Non-Adoption Options

1. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

- take additional evidence about \_\_\_\_\_;
- make additional findings about \_\_\_\_\_;
- conduct the following specific proceedings: \_\_\_\_\_.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

By: \_\_\_\_\_

Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

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2. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

Remand case to CSSD.

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 \_\_\_\_\_ day of \_\_\_\_\_, 2007.

By: Signed \_\_\_\_\_

Jerry Burnett

Director, Administrative Services

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