

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,506

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Office of Child Support (OCS) refusing to file in the petitioner's behalf a motion to modify a previous order by the Family Court that established an amount of \$93.33 a week in child support to be paid by the petitioner's ex-husband. On April, 1995, the hearing officer heard preliminary arguments by the parties and took under consideration the written information the petitioner had made available to OCS regarding her ex-husband's finances when she requested that OCS file a motion to modify her existing child support order. The hearing officer informed the parties that he would first consider whether the Board had jurisdiction to review OCS's decision in this matter, and that if he determined that the Board did have jurisdiction he would schedule further hearing to consider whether OCS should be ordered to file a motion to modify in the petitioner's behalf.

In a memorandum dated May 3, 1995, the hearing officer notified the parties that he had determined that the Board did have jurisdiction, and that the matter would be set for further hearing. On June 1, 1995, prior to the date that had been set for further hearing (June 14, 1995) OCS filed a written argument with supporting documents requesting that the hearing officer reconsider his decision regarding the Board's jurisdiction to review this matter. Upon receipt of this argument, the hearing officer continued the matter so that he could more carefully consider OCS's arguments.

In a memo dated July 10, 1995, the hearing officer notified the parties of his determination that the Board had jurisdiction to consider whether OCS had abused its discretion in declining to pursue modification of support in the petitioner's behalf. OCS has not contested this ruling. A hearing was held on July 26, 1995, at which time the petitioner testified and introduced documents relative to her ex-husband's financial status.

FINDINGS OF FACT

The petitioner in this matter is convinced that her ex-husband has income and assets beyond those found by the Family Court in its Order dated October 22, 1992 (see attachment). It is clear, however, that her conviction in this regard is based on suspicion and speculation rather than any hard facts and information regarding her ex-husband's circumstances.

The Family Court in its 1992 Order devoted considerable time and effort in attempting to ascertain the non-custodial parent's income and resources. In support of her request that OCS review and seek an adjustment of that Order the petitioner submitted the following affidavit:

1. I feel that financial information not totally complete and accurate.
2. I feel that assets are not be declared
3. I feel that (ex-husband) is working and not showing total income.
4. I feel that (ex-husband) is not earning amount consistent with his skills as a foreman/excavation for 18 yrs in one company
5. I feel that expense records are not truthful
6. That (ex-husband/ex-husband's employer) are working together to keep income lower.

At the hearing the petitioner presented testimony and documents that she believes support her suspicions regarding her ex-husband's financial status. OCS concedes that there may well be a basis to suspect that the petitioner's ex-husband is underreporting income. The problem, however, is that he is employed by his parents' construction company, and there is no independent means to show that he and his employer are colluding to underreport his income.⁽¹⁾

Since the Family Court's Order in October, 1992, OCS has filed a Motion to Compel Discovery of the ex-husband's earnings and has followed up on several of the leads suggested by the petitioner. In 1994, the petitioner at her own expense, hired a private investigator to find out if her ex-husband was underreporting his income. Although these efforts did nothing to allay the petitioner's suspicions, they produced no actual evidence that the petitioner's ex-husband has income and resources beyond which he is reporting to the Family Court, IRS, DET, and OCS.

The petitioner's ex-husband works as a heavy-equipment operator/foreman for his parents' construction business. He has reported income from \$20,000 to \$25,000 a year for the past several years. He also reports that he is routinely laid off in the winter months, during which time he collects unemployment compensation. Although the petitioner disputes this, OCS's investigations indicate that his reported earnings are in line with other seasonally-employed people in the local construction industry with similar duties and experience.

Moreover, OCS has calculated that even if the Family Court were to impute the petitioner's ex-husband's present reported monthly employment earnings as available to him on a year-round basis, under the child support guidelines his child support payments would be lower than what they are now.

ORDER

OCS's decision is affirmed.

REASONS

15 V.S.A. § 660 includes the following provisions:

(a) On motion of either parent or any other person to whom support has previously been granted, or any person previously charged with support, and upon a showing of a real, substantial and unanticipated change of circumstances, the court may annul, vary or modify a child support order, whether or not the order is based upon a stipulation or agreement.

(b) A child support order, including an order in effect prior to adoption of the support guideline, which varies more than ten percent from the amounts required to be paid under the support guideline, shall be considered a real, substantial and unanticipated change of circumstances.

...

(d) A motion to modify a support order under subsection (b) of this section shall be accompanied by an affidavit setting forth calculations demonstrating entitlement to modification and shall be served on other parties and filed with the court. Upon proof of service, and if the calculations demonstrate cause for modification, the clerk of the court shall enter an order modifying the support award in accordance with the calculations provided, unless within 20 days of service of, or receipt of, the request for modification, either party requests a hearing. The court shall conduct a hearing within 20 days of the request. No order shall be modified without a hearing if one is requested.

...

Although the petitioner's suspicions regarding her ex-husband's income and resources may be well founded, she has presented no actual evidence to support her claim that her ex-husband's present income would yield a greater-than-ten-percent increase under the child support guidelines in the amount of support he should be paying. The petitioner argues, however, that OCS at least has the duty to further investigate the situation and try to obtain that evidence for her.

Although the federal regulations do require state child collection agencies to maintain "minimum organizational and staffing requirements" sufficient, inter alia, to conduct "(a)ctivities related to investigation necessary to accomplish the functions of (child support collection)"⁽²⁾ it cannot be concluded that OCS, in the absence of any firm evidence, is required by law to mount a full-scale investigation of an individual's income beyond which that individual reports under oath to IRS, the Family Court, and other governmental agencies. In this case, it cannot be concluded that OCS has abused its discretion in either not investigating the matter further or not seeking a modification based on the information it now has.

OCS Regulation No. 2504.2 includes the provision:

Decisions involving the professional judgement of legal staff are not subject to review.

In this case it is clear that the decision by OCS not to seek a modification of the petitioner's existing child support order is based on a reasonable assessment of the available evidence, of the limitations of its staff, and of its duties under applicable federal and state law.⁽³⁾ OCS should not take this decision to mean, however, that it can justify a refusal to make further investigation in any case based solely on staffing limitations. The Board is concerned that compelling cases like the petitioner's are not getting the

attention that a reasonable person might well conclude they deserve. The Board considers it OCS's responsibility to make the legislature aware of its staff limitations and to request the additional funding that might enable it to pursue cases like the petitioner's in the future. At this time, however, the Board is bound by its laws and polices to affirm OCS's decision. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

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1. Virtually all the documents submitted by the petitioner can also be viewed as verifying her ex-husband's reported income.
2. See 45 C.F.R. § 303.20(c)(8).
3. OCS has offered to assist the petitioner in filing her own petition to modify, but it has declined to formally "represent" her in this effort.