

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TMT,		: NO. 10 – 21,203
	Petitioner	: PACSES NO. 627111967
		:
	vs.	:
		: DOMESTIC RELATIONS SECTION
ATF,		:
	Respondent	: Exceptions

**OPINION AND ORDER**

Before the Court are Petitioner’s exceptions to the Family Court Order of April 24, 2013. Argument on the exceptions was heard July 23, 2013.

A hearing was convened in Family Court in response to Petitioner’s request for a modification. Petitioner alleged that she had quit her job due to health issues but the hearing officer found her not credible and assigned her an earning capacity based on her prior employment. The hearing officer also granted Respondent a deviation in the support amount based on her belief that she could not consider Petitioner’s tax refund because she had been assigned an earning capacity. Petitioner takes exception to both of these decisions.

With respect to the earning capacity, although Petitioner testified to certain issues she alleged she was having which prevented her from performing her job, the hearing officer found this testimony not credible in light of the testimony of Petitioner’s treating physician that she is capable of performing the duties of her former job. The court finds no reason to disturb the hearing officer’s findings in this regard.

With respect to the deviation, the court agrees with Petitioner that the hearing officer erred in providing for such. The hearing officer granted a 25% deviation based on her belief that she was “not permitted to include [Petitioner’s] tax refund in calculating her income” because Petitioner had been assigned an earning capacity. While assessment of an earning capacity which considers a party’s actual tax liability may preclude consideration of a tax refund, in this case the earning capacity was based on paystubs. In the Order of July 12, 2012, Petitioner’s income from employment was calculated by multiplying the rate of pay by 40

hours per week and then deducting withholding at the rate of 16.67%, which withholding rate was gleaned from the paystubs. Thus, the actual tax liability was not calculated and the refund, which compensates for over withholding, should have been included, rather than providing for a deviation. Adding the refund of \$7,363 to Petitioner's monthly net income of \$2,302, however, results in an alimony pendente lite payment of \$755.60, only \$4.52 per month more than was awarded. The court considers such to be *de minimus* and will not require the Domestic Relations Office to make any adjustment.

ORDER

AND NOW, this 23rd day of July 2013, for the foregoing reasons, the exceptions are granted in part and denied in part. The Order of April 24, 2013 is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Family Court  
Domestic Relations Section  
Janice Yaw, Esq.  
Christopher Williams, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson