

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
R. FREMAN (NON-REQUESTING SPOUSE))
AND)
K. FREMAN (REQUESTING SPOUSE))
_____)
OTA Case No. 21037371

OPINION

Representing the Parties:

For R. Freman: R. Freman
For K. Freman: K. Freman
For Respondent: Brad J. Coutinho, Attorney

For the Office of Tax Appeals: Oliver Pfof, Attorney

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 19045 and 18533, R. Freman (RF) appeals an action by respondent Franchise Tax Board (FTB) granting K. Freman (KF) innocent spouse relief for the 2012, 2014, and 2015 tax years. KF joins the appeal in support of FTB’s grant.

RF and KF waived their rights to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether KF is entitled to equitable innocent spouse relief for the 2012, 2014, or 2015 tax year.

FACTUAL FINDINGS

1. RF and KF were married in 1998 but have been living apart since November 2017.¹
2. RF and KF filed an untimely joint 2012 California tax return on March 11, 2016,

¹ An undated register of actions from the Riverside County Superior Court indicates that as of November 28, 2022, RF and KF were still in legal proceedings necessary to obtain a divorce.

reporting overpaid tax of \$210.00. RF and KF later filed an amended joint 2012 California tax return on October 15, 2016, reporting total tax of \$13,772.00 and income tax withholdings of \$4,773.00, for a balance due of \$8,999.00. FTB imposed a late filing penalty of \$2,249.75, a demand penalty of \$279.95, and applicable interest. As of June 8, 2021, additional payments totaling \$3,139.85 have been applied towards the 2012 tax year liability.²

3. RF and KF filed an untimely joint 2014 California tax return on November 14, 2016, reporting tax due of \$1,853.00. FTB imposed a late filing penalty of \$463.25, a demand penalty of \$463.25, a filing enforcement fee of \$79.00, and applicable interest. As of the date briefing for this appeal closed, no payments have been made towards the 2014 liability.
4. RF and KF filed a timely joint 2015 California tax return on October 12, 2016, reporting tax due of \$2,386.00. FTB imposed a late payment penalty of \$596.50, a collection cost recovery fee of \$287.00, and applicable interest. As of the date briefing for this appeal closed, no payments have been made towards the 2015 liability.
5. KF first requested innocent spouse relief for the 2006, 2012, 2014, 2015, 2017, and 2018 tax years in September 2018, which FTB denied on the basis that KF did not provide sufficient information justifying relief.
6. In January 2020, FTB received KF's second request for innocent spouse relief for the 2012, 2014, and 2015 tax years. FTB sent RF a Non-Requesting Taxpayer Notice, informing RF of KF's request for innocent spouse relief and providing RF with an opportunity to submit information or file an objection to KF's request for relief. RF did not respond.
7. In January 2021, FTB issued RF and KF Notices of Action granting KF innocent spouse relief for the 2012, 2014, and 2015 tax years pursuant to R&TC section 18533(b).³

² KF has not established that any portion of the payments totaling \$3,139.85 are solely attributable to KF. Consequently, FTB is not treating KF's innocent spouse request as a claim for refund of that amount. KF did not respond to FTB's position regarding the possibility of a refund; therefore, whether any refund is owed for the 2012 tax year is not an issue on appeal.

³ As discussed below, FTB clarifies on appeal that it erred in granting innocent spouse relief pursuant to R&TC section 18533(b), as opposed to pursuant to R&TC section 18533(f), since the liabilities at issue are self-assessed unpaid liabilities.

8. RF timely appealed to the Office of Tax Appeals (OTA) the Notices of Action granting KF innocent spouse relief for the 2012, 2014, and 2015 tax years.

DISCUSSION

When a joint return is filed by a married couple, each spouse is jointly and severally liable for the tax due on the aggregate income on the return. (R&TC, § 19006(b).) Federal and California law provide that an individual who files a joint return may be relieved of all or a portion of the joint and several liability if the individual qualifies as an innocent spouse. (Internal Revenue Code (IRC), § 6015; R&TC, §§ 18533, 19006(c).) When a California statute is substantially identical to a federal statute, as in the case of the innocent spouse relief statutes in IRC section 6015 and R&TC section 18533, federal law interpreting the federal statute may be highly persuasive in interpreting the California statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838; *Appeal of Calegari*, 2021-OTA-337P.) Thus, federal authority is applied extensively in California innocent spouse cases. (*Appeal of Calegari, supra.*)

An individual claiming innocent spouse relief has the burden of proving each statutory requirement by a preponderance of the evidence. (*Stevens v. Commissioner*, T.C. Memo. 1988-63; *Appeal of Calegari, supra.*) A preponderance of the evidence means that an individual must establish by documentation or other evidence the circumstances the individual asserts are more likely than not to be correct. (*Appeal of Carr*, 2022-OTA-157P.) Since most innocent spouse provisions are remedial in nature, they are construed and applied liberally in favor of the individual claiming their benefits. (*Friedman v. Commissioner* (2d Cir. 1995) 53 F.3d 523, 528-529.) Nevertheless, provisions providing relief from joint and several liability are “designed to protect the innocent, not the intentionally ignorant.” (*Morello v. Commissioner*, T.C. Memo. 2004-181, citing *Dickey v. Commissioner*, T.C. Memo. 1985-478.) Unsupported assertions are not sufficient to satisfy an individual’s burden of proof. (*Appeal of Mauritzson*, 2021-OTA-198P.)

There are four types of innocent spouse relief under R&TC section 18533: traditional relief under R&TC section 18533(b); a separate liability election under R&TC section 18533(c); equitable relief under R&TC section 18533(f); and conforming relief under R&TC section 18533(i) when innocent spouse relief has been granted by the IRS. Determinations under R&TC section 18533 are made without regard to community property laws. (R&TC,

§ 18533(a)(2).) In determining whether an individual is entitled to relief under R&TC section 18533(b), (c), or (f), the standard of review is de novo.⁴ (*Appeal of Calegari, supra.*)

FTB issued Notices of Action to RF and KF granting KF traditional innocent spouse relief under R&TC section 18533(b) for the 2012, 2014, and 2015 tax years. On appeal, FTB states that KF is not eligible for relief under R&TC section 18533(b) because the liabilities at issue are self-assessed, unpaid liabilities, as opposed to understatements of tax. FTB is correct. In order to qualify for traditional innocent spouse relief pursuant to R&TC section 18533(b), the return must contain an understatement of tax attributable to an erroneous item of the other spouse, among other requirements. (R&TC, § 18533(b)(1)(B) & (b)(3).) In other words, R&TC section 18533(b) requires the existence of a deficiency due to an understatement of tax rather than an underpayment of reported tax. (*Appeal of Calegari, supra.*) There is no dispute that the liabilities at issue for the 2012, 2014, and 2015 tax years are for underpayments of self-reported tax. Thus, KF is not eligible for traditional innocent spouse relief under R&TC section 18533(b).

FTB maintains that KF is instead eligible for equitable innocent spouse relief under R&TC section 18533(f).⁵

Equitable Innocent Spouse Relief—R&TC section 18533(f)

R&TC section 18533(f) provides that FTB may relieve an individual from a joint and several tax liability if: (1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for the unpaid tax or understatement; and (2) the individual does not otherwise qualify for relief under R&TC sections 18533(b) or (c).

In considering whether, under all the facts and circumstances, it would be inequitable to hold KF liable for the underpayments of tax for the 2012, 2014, and 2015 tax years, OTA looks to IRS Revenue Procedure 2013-34, which provides guidelines for the IRS to follow in deciding whether to grant equitable innocent spouse relief. (*Appeal of Calegari, supra.*) Revenue Procedure 2013-14 sets forth a three-step process for evaluating requests for equitable innocent spouse relief: (1) section 4.01 lists seven threshold conditions that must be met before the IRS

⁴ The standard of review refers to the amount of deference an adjudicatory body, such as OTA, gives to an agency, such as FTB, when it reviews its decisions. (*Appeal of Calegari, supra.*) The United States Tax Court has defined de novo review as one that “entails independent factfinding and legal analysis unmarked by deference to the administrative agency.” (*Wilson v. Commissioner*, T.C. Memo. 2010-134.)

⁵ Neither FTB nor KF argue that KF qualifies for separate liability relief under R&TC section 18533(c).

will consider equitable relief; (2) section 4.02 specifies the situation in which the IRS will make a streamlined relief determination; and (3) section 4.03 sets forth a list of nonexclusive factors the IRS will consider in determining whether relief should be granted should the requesting spouse not qualify for streamlined relief.

Threshold Requirements—Section 4.01

Section 4.01 of Revenue Procedure 2013-34 sets forth the following threshold requirements for an individual requesting relief:

1. The requesting spouse filed a joint return for the tax year in which relief is sought;
2. Relief is not available to the requesting spouse under traditional or separate allocation innocent spouse relief;
3. The requesting spouse applies for relief within the applicable statute of limitations for requesting relief;⁶
4. No assets were transferred between the spouses as part of a fraudulent scheme;
5. The non-requesting spouse did not transfer disqualified assets to the requesting spouse;
6. The requesting spouse did not file a return with fraudulent intent; and
7. The income tax liability from which the requesting spouse seeks relief is attributable (in full or in part) to an item or income of the individual with whom the requesting spouse filed the joint return. If the liability is partially attributable to the requesting spouse, then relief can be considered only for the portion of the liability attributable to the non-requesting spouse. However, relief can still be considered regardless of whether the understatement, deficiency, or underpayment is attributable (in full or in part) to the requesting spouse, if a specified exception applies.

Threshold requirements numbers 1, 2, and 3 are clearly met: RF and KF filed joint returns for the tax years in which relief is sought, neither traditional nor separate allocation relief is available to KF, and the statute of limitations for equitable relief has not expired.

⁶ Revenue Procedure section 4.01(3)(a) provides if a requesting spouse is applying for relief from a liability or a portion of a liability that remains unpaid, the request for relief must be made on or before the Collection Statute Expiration Date (CSED). The CSED is the date the period of limitation on collection of the income tax liability expires, as provided in IRC section 6502. This period generally expires 10 years after the assessment of tax, but it may be extended by other provisions of the IRC. Under R&TC section 19255, FTB has a 20-year collection statute of limitations.

Regarding threshold requirements numbers 4, 5, and 6, there is no evidence showing, and no party to this appeal contends, that KF received disqualified assets or assets in a fraudulent scheme or filed returns with fraudulent intent.

Regarding threshold requirement number 7, the evidence shows the income reported on the 2012, 2014, and 2015 joint tax returns is entirely attributable to RF for those tax years. When an item is attributable or partially attributable to the requesting spouse (i.e., KF) solely due to the operation of community property law, then for purposes of IRS Revenue Procedure 2013-34, that item (or portion thereof) will be considered to be attributable to the non-requesting spouse (i.e., RF). (Rev. Proc. 2013-34, § 4.01(7)(a).) In response to FTB's requests for more information, RF stated that none of the income reported on the 2012, 2014, and 2015 returns was earned solely by KF, while KF stated that KF was a stay-at-home spouse who was not employed outside the home during those tax years. FTB determined that income information obtained from third parties corroborated that the income for the tax years at issue is fully attributable to RF. In sum, the evidence shows all income reported on the 2012, 2014, and 2015 returns is attributable to RF, the non-requesting spouse; therefore, KF meets threshold requirement number 7.

Since KF meets all seven threshold requirements, OTA turns to the determination of whether KF meets the requirements for a streamlined determination under section 4.02 or the balancing factors under section 4.03 of Revenue Procedure 2013-34.

Streamlined Determination—Section 4.02

Section 4.02 of Revenue Procedure 2013-34 provides the following list of factors which, if all are met, permit a streamlined determination of equitable innocent spouse relief:

1. At the time the government makes its innocent spouse determination, the requesting spouse establishes that he or she is separated (whether legally separated or living apart for at least a 12-month period ending on the date the IRS makes its determination) or divorced from the non-requesting spouse, or is a widow(er) and not an heir to the non-requesting spouse's estate;
2. The requesting spouse establishes he or she would suffer economic hardship if relief were not granted; and
3. The requesting spouse establishes he or she did not know or have reason to know that there was an understatement or deficiency on the joint return or did not know or have

reason to know as of the date the return was filed that the non-requesting spouse would not or could not pay the tax liability at the time or within a reasonable period of time after filing the return.

The first factor is satisfied, as RF and KF have been living apart since 2017. As for the second factor, economic hardship exists if the satisfaction of the tax liability in whole or in part will cause the requesting spouse to be unable to pay reasonable, basic living expenses. (Rev. Proc. 2013-34, §§ 4.02(2), 4.03(2)(b).) The taxing agency will compare the requesting spouse's income to the federal poverty guidelines for the requesting spouse's family size and will determine by how much, if at all, the requesting spouse's monthly income exceeds his or her reasonable, basic living expenses by \$300 or less. (Rev. Proc. 2013-34, § 4.03(2)(b).) An "incomplete picture" of the basic living expenses of the spouse requesting innocent spouse relief "cuts against relief." (*Sleeth v. Commissioner* (11th Cir. 2021) 991.F.3d 1201, 1206, citing *Commissioner v. Neal* (11th Cir. 2009) 557 F.3d 1262, 1278.)

The only document in the record concerning KF's financial situation is a self-reported income and expense schedule, signed under penalty of perjury, which is part of KF's first request for innocent spouse relief, dated August 8, 2018. This schedule reports KF's income is less than the federal poverty guidelines for 2018, and KF's expenses exceed KF's income by \$750 a month. The source of KF's reported income is almost entirely alimony and child support, with minimal wage income. KF has not, however, provided documentation which independently supports the information reported on the income and expense schedule, such as paycheck stubs, bank or credit card statements, or divorce documents verifying an agreement or order for alimony or child support. Although innocent spouse provisions are to be construed and applied liberally in favor of the individual claiming their benefits, the individual must provide at least some evidence independent of a self-reported income and expense schedule to support his or her assertions. OTA finds that KF has not shown that KF would suffer economic hardship if relief is not granted, which is required for streamlined relief under Section 4.02. Consequently, KF is not entitled to a streamlined determination of equitable innocent spouse relief.

Balancing Factors—Section 4.03

If the threshold requirements of section 4.01 are satisfied, and streamlined equitable innocent spouse relief is unavailable, equitable relief may be available to a requesting spouse based on the following nonexclusive factors pursuant to section 4.03 of Revenue Procedure

2013-34: (1) the requesting spouse's marital status; (2) whether the requesting spouse would suffer an economic hardship if relief is not granted; (3) the requesting spouse's knowledge or reason to know whether the non-requesting spouse would or could pay the tax liability shown on the return; (4) the non-requesting spouse's legal obligation to pay the tax liability; (5) whether the requesting spouse significantly benefited from the unpaid tax liability; (6) the requesting spouse's compliance with income tax laws in the following tax years; and (7) the requesting spouse's mental and physical health at the time he or she signed the returns.

No single factor is determinative; the list of factors is not exhaustive, and the degree of importance of each factor varies depending on the requesting spouse's facts and circumstances. (Rev. Proc. 2013-34, § 4.03(2).) Section 3.05 of Revenue Procedure 2013-34 states that, depending on the facts and circumstances of the case, relief may still be appropriate if the number of factors weighing against relief exceeds the number of factors weighing in favor of relief, or a denial of relief may still be appropriate if the number of factors weighing in favor of relief exceeds the number of factors weighing against relief. Equitable relief may be inappropriate even if a simple counting of factors would seem to favor relief. (Rev. Proc. 2013-34, §§ 3.05 & 4.03(2); *Henson v. Commissioner*, T.C. Memo. 2012-288; *Appeal of Calegari*, *supra*.)

(1) Marital status

This factor weighs in favor of relief if the requesting spouse is no longer married to the non-requesting spouse. (Rev. Proc. 2013-34, § 4.03(2)(a).) For purposes of this factor, a requesting spouse will be treated as no longer married to the non-requesting spouse if, among other situations, the requesting spouse has not been a member of the same household as the non-requesting spouse at any time during the 12-month period ending on the date the agency makes its determination. (Rev. Proc. 2013-34, § 4.03(2)(A)(4).) A requesting spouse is a member of the same household as the non-requesting spouse for any period in which the spouses maintain the same residence. (*Ibid.*) Here, KF and RF have been living apart, and thus not of the same household, since November 2017. FTB granted KF innocent spouse relief in January 2021, well past the 12-month period. Accordingly, this factor weighs in favor of relief.

(2) Economic hardship

If denying relief from joint and several liability will cause the requesting spouse to suffer economic hardship, this factor weighs in favor of relief. (Rev. Proc. 2013-34, § 4.03(2)(b).) If a denial of relief will not cause the requesting spouse to suffer economic hardship, this factor is neutral. (*Ibid.*) As discussed above, OTA finds that KF has not shown that KF would suffer economic hardship if relief is not granted. Accordingly, this factor is neutral.

(3) Knowledge of underpayments

In regard to the knowledge factor, when an income tax liability was properly reported but not paid, the inquiry is whether, as of the date the return was filed (or the date the requesting spouse reasonably believed the return was filed), the requesting spouse knew or had reason to know that the non-requesting spouse would not or could not pay the tax liability at the time or within a reasonable period of time after the filing of the return. (Rev. Proc. 2013-34, § 4.03(2)(c)(ii).) This factor weighs in favor of relief if the requesting spouse reasonably expected the non-requesting spouse to pay the tax liability reported on the return. (*Ibid.*) This factor weighs against relief if, based on the facts and circumstances of the case, it was not reasonable for the requesting spouse to believe that the non-requesting spouse would or could pay the tax liability shown on the return. (*Ibid.*) Depending on the facts and circumstances, if the requesting spouse was abused by the non-requesting spouse, or the non-requesting spouse maintained control of the household finances by restricting the requesting spouse's access to financial information, and because of the abuse or financial control, the requesting spouse was not able to question the payment of the taxes reported as due on the return or challenge the non-requesting spouse's assurance regarding payment of the taxes for fear of the non-requesting spouse's retaliation, this factor weighs in favor of relief even if the requesting spouse knew or had reason to know about the non-requesting spouse's intent or ability to pay the taxes due. (*Ibid.*)

Concerning KF's knowledge of the underpayments, RF contends that all tax filings and tax returns were filed by the couple as joint returns. RF contends that RF and KF are in divorce proceedings and the assignment of debts has not been resolved or settled. Finally, RF contends

the IRS denied KF innocent spouse relief for 2012, 2014, and 2015 tax years, and FTB previously denied KF innocent spouse relief for the 2012 and 2015 tax years.

KF contends RF verbally and mentally abused KF when money matters were involved; withheld money for food, clothing, and other basic needs; made most or all financial decisions for KF; and made KF afraid to disagree with RF. KF contends that KF trusted RF would handle and take care of the taxes and KF did not know who prepared their tax returns, what they owed, or why.

While RF contends that KF should be denied relief because the IRS and FTB previously denied relief, RF points to no authority showing why the federal denial and the previous FTB denial disqualify KF from being granted relief in the instant appeal. Under R&TC section 18533(i), FTB shall grant innocent spouse relief if the IRS grants innocent spouse relief for the same tax year if several enumerated conditions are satisfied. However, the converse is not true. That is, FTB is not obligated to conform to the denial of innocent spouse relief by the IRS. (See *Appeal of Calegari, supra.*)

Regarding RF's contention that the debts have not been resolved or settled in the divorce proceedings, a court may revise a tax liability in a proceeding for dissolution of marriage, provided certain requirements are met pursuant to R&TC section 19006(b). However, RF has not produced evidence showing the joint and several tax liabilities have been revised by a court in a proceeding for dissolution of marriage, nor that such revision was in accordance with R&TC section 19006(b). KF thus remains eligible for innocent spouse relief under R&TC section 18533 despite the unresolved debts.

Concerning the alleged abuse, RF's and KF's daughter provided a signed statement contending that RF: (1) maintained a separate bank account; (2) limited KF and their daughter to a monthly allowance; (3) was angered if KF requested more money for groceries and bills; and (4) took over the job of paying bills because RF was angry KF paid the bills on time. The daughter also alleges KF was advised to set aside money because RF was unpredictable. The daughter's statements are supported by a letter from a Marriage and Family Therapist stating the daughter describes RF as emotionally abusive and untrustworthy. RF did not address these allegations before OTA, despite being given the opportunity.

OTA finds KF has met KF's burden of proof by documentation or other evidence that the circumstances she asserts regarding this factor are more likely than not to be correct.

Independent statements support KF's contentions that RF maintained control over the couple's finances and caused KF to fear retaliation. This factor weighs in favor of relief.

(4) Legal obligation

This factor weighs in favor of relief if the non-requesting spouse has the sole legal obligation to pay the outstanding tax liability under a divorce decree or separate agreement. (Rev. Proc. 2013-34, § 4.03(2)(d).) This factor is neutral if the divorce decree or separation agreement is silent as to any obligation to pay the outstanding income tax liability. (*Ibid.*) Here, there is no evidence of a divorce decree or a separate agreement assigning the legal obligation to pay the outstanding tax liability to RF or KF. This factor is neutral.

(5) Significant benefit

A significant benefit is any benefit in excess of normal support. (Rev. Proc. 2013-34, § 4.03(2)(e).) For example, if the requesting spouse enjoyed the benefits of a lavish lifestyle, such as owning luxury assets and taking expensive vacations, this factor weighs against relief. If the amount of unpaid tax was small such that neither spouse received a significant benefit, then this factor is neutral. (*Ibid.*) Whether the amount of unpaid tax is small such that neither spouse received a significant benefit will vary depending on the facts and circumstances of each case. (*Ibid.*)

In its determination to grant KF innocent spouse relief, FTB found the amount of the self-assessed tax liability at issue to be relatively small. RF does not allege, and the record does not indicate, that KF received a significant benefit as a result of the underpayment of taxes. This factor is neutral.

(6) Compliance with income tax laws

If the requesting spouse remains married to the non-requesting spouse but files separate returns, this factor will weigh in favor of relief if the requesting spouse is compliant with the tax laws and will weigh against relief if the requesting spouse is not compliant with the tax laws. (Rev. Proc. 2013-34, § 4.03(2)(f)(iii).) If the requesting spouse made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor will be neutral. (*Ibid.*) According to FTB records, KF has been compliant with California income tax laws apart from the tax years at issue. This factor weighs in favor of relief.

(7) Mental or physical health

This factor weighs in favor of relief if the requesting spouse was in poor physical or mental health at the time the return or returns were filed. (Rev. Proc. 2013-34, § 4.03(g).) The nature, extent, and duration of the condition, including the ongoing economic impact of the illness, will be considered. (*Ibid.*) If the requesting spouse was in neither poor physical nor poor mental health, this factor is neutral. (*Ibid.*)

RF and KF filed their original 2012 California income tax return on March 11, 2016, and an amended 2012 California income tax return on October 15, 2016. RF and KF filed a 2014 California income tax return on November 14, 2016, and a 2015 California income tax return on October 12, 2016. KF provides hospital discharge instructions dated August 31, 2015, indicating KF suffered a serious medical condition at that time which required hospitalization. KF also provides two separate physician letters dated May 7, 2018, and October 12, 2018, in which the physician provides the medical opinion that KF should limit work to 20 hours per week due to KF's medical condition. The hospital discharge instructions clearly show KF was in poor physical health on or around August 31, 2015. However, the tax returns relevant to this appeal were all filed in 2016. KF has not provided evidence showing KF was in poor physical health when these returns were filed. Although the evidence shows KF was hospitalized in August 2015, KF must make a further showing that establishes the medical condition was present when the returns were filed. That has not been done here; therefore, this factor is neutral.

Based on the above analysis, three factors weigh in favor of relief, no factors weigh against relief, and four factors are neutral, weighing neither in favor of nor against relief. In light of all the facts and circumstances, OTA finds that KF has established that KF is entitled to equitable innocent spouse relief for the 2012, 2014, and 2015 tax years.

HOLDING

KF is entitled to equitable innocent spouse relief for the 2012, 2014, and 2015 tax years.

DISPOSITION

FTB’s action granting KF innocent spouse relief is sustained.

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

DocuSigned by:
Asaf Kletter
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Asaf Kletter
Administrative Law Judge

Date Issued: 8/31/2023