

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

M. RIEDEL) OTA Case No. 220410176
) CDTFA Case ID 2-159-173
)
)
)
)**OPINION**

Representing the Parties:

For Appellant:

M. Riedel
Bruce Riedel, Representative

For Respondent:

Mari Guzman, Tax Counsel III

For Office of Tax Appeals:

Steven Kim, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, M. Riedel (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying, in part, appellant’s petition for redetermination of a June 29, 2020 Notice of Determination (NOD) for tax of \$80,531.73, plus applicable interest, and penalties totaling \$8,136.10 for the period October 1, 2018, through June 30, 2019 (liability period). The NOD reflects CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid sales and use tax liabilities of Ciao Restaurants, LLC (Ciao). After issuing the NOD but prior to this appeal to the Office of Tax Appeals (OTA), CDTFA removed the periods October 1, 2018, through December 31, 2018, and April 1, 2019, through June 30, 2019, from the liability period. Thus, CDTFA ultimately found appellant liable for tax of \$19,826.00, plus applicable interest, and penalties totaling \$2,588.60 for the period January 1, 2019, through March 31, 2019.

¹ Sales and use taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant is personally liable for the unpaid sales and use tax liabilities of Ciao for the period January 1, 2019, through February 24, 2019.²
2. Whether a \$20,000 payment made by Ciao on March 29, 2019, was properly applied.

FACTUAL FINDINGS

1. Appellant was a member-manager of Ciao Restaurants, LLC (Ciao), a California limited liability company (LLC) operating a full-service restaurant in Roseville, California. Ciao held a seller's permit effective from December 1, 2017, through June 30, 2019.³
2. According to Ciao's operating agreement effective October 17, 2017, Ciao had three members with equal ownership of the LLC: M. Mulgeci, A. Jimenez, and appellant. The operating agreement states that the LLC shall be managed by all LLC members. During the time frame relevant to this appeal, A. Jimenez was no longer associated with the LLC, and appellant and M. Mulgeci held equal ownership interests.
3. Ciao's operating agreement states that it "shall keep an accurate accounting of its affairs using any method of accounting allowed by law. All members shall have a right to inspect the records during normal business hours. The members shall have the power to hire such accountants as they deem necessary or desirable." It states that "the members of [the LLC] shall be authorized to set up bank accounts as in their sole direction are deemed necessary...." The agreement also states that "[the LLC] shall file such tax returns as required by law." The operating agreement is signed by all three members.
4. According to Ciao's Articles of Organization filed with the Secretary of State on October 5, 2017, the LLC was managed by all LLC members. According to Ciao's Statement of Information filed with the Secretary of State on April 16, 2018, M. Mulgeci and appellant were managers or members.

² Appellant concedes that he is liable for Ciao's unpaid liabilities from February 25, 2019, to March 31, 2019.

³ Ciao's seller's permit application lists appellant and A. Jimenez as LLC principals.

5. It is undisputed that Ciao collected sales tax reimbursement with respect to its taxable sales during the liability period.⁴
6. On March 19, 2019, CDTFA revoked Ciao’s seller’s permit.
7. According to notes in CDTFA’s Centralized Revenue Opportunity System (CROS) dated July 3, and July 9, 2018, CDTFA contacted J. Charity, whom CDTFA referred to as president of Ciao, regarding Ciao’s return for the period January 1, 2018, through March 31, 2018, i.e., the first quarter of 2018 (1Q18). According to a CROS note dated July 11, 2018, CDTFA spoke with appellant regarding the filing of Ciao’s return, and appellant informed CDTFA that J. Charity was the one who filed Ciao’s returns, and that appellant would communicate with J. Charity to file the return “ASAP.” CDTFA also reminded appellant that the 2Q18 return was due at the end of the month. According to CROS notes dated between August 14, 2018, and September 17, 2018, CDTFA spoke with J. Charity to discuss Ciao’s late returns and payments for 1Q18 and 2Q18. J. Charity stated he would file the late returns and make payments.
8. According to a police report filed with the City of Roseville Police on March 23, 2019, appellant first reported on February 25, 2019, that he believed J. Charity, the husband of M. Mulgeci, was embezzling money from Ciao.⁵ Appellant provided Ciao’s bank statements to the police and highlighted transactions he believed were personal expenses by J. Charity. Appellant stated that J. Charity was added as an authorized signer of the business bank accounts to manage finances beginning November 2017, but was not a partner.⁶ Appellant stated that he began investigating Ciao’s finances when an employee informed him that J. Charity had been “moving money around.” Appellant stated he had nothing in writing detailing J. Charity’s role in the business. Appellant stated that it was

⁴ During the CDTFA appeals process, appellant conceded that Ciao charged and collected sales tax reimbursement on its taxable sales. According to CDTFA’s October 28, 2021 decision, Ciao charged and collected sales tax reimbursement on a sales receipt dated April 15, 2018, and Ciao also reported that its total sales included sales tax on its self-assessed sales and use tax return for the period April 1, 2019, through June 30, 2019.

⁵ The Placer County District Attorney’s Office filed a felony complaint for identity theft against J. Charity on September 29, 2020. The record does not contain any other information about the felony complaint.

⁶ The use of the term “partner” suggests that Ciao may have elected to be taxed as a partnership during this period. Even when an LLC is taxed as a partnership, its owners are referred to as members.

agreed J. Charity would be compensated for his work by taking a consulting fee of \$2,000 a month.⁷

9. According to the police report, J. Charity stated to the police that he had used Ciao's business accounts to pay for his personal expenses, but that he was not stealing and that it was his way of being paid for his work. The police report indicates that J. Charity stated that M. Mulgeci and appellant appointed J. Charity to manage the business expenses and pay bills, and that he was added to the business banking accounts as an authorized user, though he was not listed as a partner. The report indicates J. Charity stated it was agreed he would be paid a salary of \$3,000 and he would receive his payment as transfers to his business, but that this agreement was not in writing.
10. On March 6, 2019, appellant filed a civil complaint for damages and injunctive relief against M. Mulgeci and J. Charity. In the complaint, appellant alleges that J. Charity and M. Mulgeci withdrew funds from Ciao's business accounts and used business funds to pay for personal expenses without appellant's authorization or knowledge. Appellant also alleges that J. Charity was a paid consultant for Ciao with "day-to-day IT and financial responsibilities" until he was fired on February 27, 2019. Appellant alleges that M. Mulgeci and J. Charity have sole access to all financial account passwords and codes for Ciao and refused to provide such information to appellant. Appellant asserts that the only way he could operate Ciao is by going to the bank and transferring \$90,000 from Ciao's checking account before J. Charity and M. Mulgeci knew appellant discovered the embezzlement. Appellant asserts that he used those funds to open a new account for Ciao to ensure he could pay its ongoing bills and expenses.
11. After Ciao dismissed J. Charity from his position as consultant, appellant's father worked as a representative for Ciao and corresponded with CDTFA. For instance, on April 3, 2019, CDTFA stated to appellant's father that payment for 1Q19 was due by April 30, 2019. On April 25, appellant's father stated to CDTFA that he and appellant were working to get funds together for 1Q19. On May 2, 2019, appellant's father and CDTFA discussed the payment for 1Q19, and that appellant could access one of the bank accounts.

⁷ According to CROS notes dated April 25, 2019, appellant's father corresponded with CDTFA that he and appellant were working to pay the liabilities, and that their "previous bookkeeper embezzled them."

12. Ciao made a payment of \$20,000 by check dated March 21, 2019, which CDTFA applied to the LLC's liability for 3Q18. Specifically, on March 29, 2019, CDTFA applied \$19,900 towards Ciao's unpaid liability for 3Q18 and \$100 as payment for a reinstatement fee. CDTFA then reinstated Ciao's seller's permit.
13. Information obtained from the Employment Development Department (EDD) shows that Ciao paid wages of \$211,085.84 during 2Q19. During 2Q19, Ciao also paid \$21,305.30 for supplies and \$25,200.44 for rent.
14. On May 30, 2019, Ciao filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Appellant signed the bankruptcy filing as managing member of Ciao. On June 26, 2019, Ciao filed a motion to convert the Chapter 11 bankruptcy to a Chapter 7 bankruptcy, and the bankruptcy case was converted as of July 8, 2019.⁸ The bankruptcy filings state that J. Charity was an accountant or bookkeeper of Ciao.
15. According to a CDTFA memorandum dated April 1, 2020 (dual determination memorandum), CDTFA was unable to track J. Charity and M. Mulgeci as they had moved back to Italy.
16. CDTFA issued appellant the June 29, 2020 NOD. Appellant filed a timely petition for redetermination of the NOD.
17. On October 28, 2021, CDTFA issued a decision finding that appellant was personally liable under R&TC section 6829 for the unpaid liabilities of Ciao only for 1Q19.
18. On February 18, 2022, CDTFA informed appellant that periods 4Q18 and 2Q19 were removed from its determination in accordance with its October 28, 2021 decision. Thus, CDTFA reduced the tax deficiency from \$80,531.73 to \$19,826.00 and the penalties from \$8,136.10 to \$2,588.60.
19. This timely appeal followed.

⁸ During CDTFA's appeals process, appellant conceded that Ciao terminated its business operations on June 30, 2019.

DISCUSSION

Issue 1: Whether appellant is personally liable for the unpaid sales and use tax liabilities of Ciao for the period January 1, 2019, through February 24, 2019.

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) Although the sales tax is imposed on the retailer, there are situations when other persons may also be held personally liable for a retailer's unpaid tax liabilities. As relevant here, R&TC section 6829 provides that a person is personally liable for the tax, penalties, and interest owed by a business entity, including an LLC, if all of the following four elements are met: (1) the LLC's business has been terminated, dissolved, or abandoned; (2) the LLC collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or had a duty to act for the LLC in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the LLC or willfully failed to cause such taxes to be paid. (R&TC, § 6829; Cal. Code Regs., tit. 18, § 1702.5.)

Burden of Proof

CDTFA must prove the elements of R&TC section 6829 by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).) That is, CDTFA must establish that the circumstances it asserts are more likely than not to be correct. (*Appeal of Eichler*, 2022-OTA-029P.) However, if the person is not an officer or a member or a partner or a manager with an ownership interest in the entity, the person is presumed to not be personally liable under California Code of Regulations, title 18, (Regulation) section 1702.5(a), unless CDTFA rebuts this presumption with clear and convincing evidence. (Cal. Code Regs., tit. 18, § 1702.5(e).)

Appellant asserts that he is only liable for the period of February 25, 2019, to March 31, 2019, because he took over operations of Ciao on February 25, 2019. From January 1, 2019, to February 24, 2019, appellant was one of two members of Ciao, the other being M. Mulgeci. Appellant asserts that, prior to February 25, 2019, M. Mulgeci was the managing member of Ciao, and that she secured the services of her spouse, J. Charity, who was

designated as the president of Ciao and served as an independent contractor to handle Ciao's finances.

According to Ciao's operating agreement, its members had equal ownership of the LLC and the LLC was managed by all members. Ciao's Articles of Organization also states that the LLC was managed by all members. Therefore, Ciao was a member-managed LLC, as opposed to a manager-managed LLC. In a member-managed LLC, the management and conduct of the LLC are vested in the members, and unless otherwise stated in the articles of organization or operating agreement, each member has equal rights in the management and conduct of the LLC's activities. (Corp. Code, § 17704.07(b).) Furthermore, unless the LLC is manager-managed, every member is an agent of the LLC for the purpose of its business or affairs. (Corp. Code, § 17703.01(a).)

Regulation section 1702.5(e) indicates that the phrase "with an ownership interest" applies only to the position of "manager." In addition, the regulatory history states "that the phrase 'with an ownership interest in the entity' only modifies the subdivision's reference to 'manager.'"⁹ Appellant was an LLC member-manager and had an ownership interest in Ciao. Therefore, appellant was a "manager with an ownership interest in the entity" as described under Regulation section 1702.5(e). As a result, the clear and convincing burden of proof under Regulation section 1702.5(e) does not apply; instead, CDTFA must prove the elements of R&TC section 6829 by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).)

Elements of R&TC section 6829

Appellant concedes elements (1) and (2) of R&TC section 6829, as described above. Therefore, the only elements in dispute are (3) and (4). In addition, appellant asserts that he took over operation of Ciao on February 25, 2019, and that he is liable for Ciao's unpaid liabilities from February 25, 2019, through March 31, 2019. Accordingly, the issues are whether appellant was responsible for Ciao's sales and use tax compliance from January 1, 2019, to February 25, 2019, and whether appellant willfully failed to pay taxes due or willfully failed to cause the taxes to be paid.

⁹ California Regulatory Notice Register 2016, No. 29-Z (July 15, 2016) p. 1200.

Responsible Person

A “responsible person” means any person having control or supervision of, or who was charged with the responsibility for, the filing of returns or the payment of tax or who had a duty to act for the LLC in complying with any provision of the Sales and Use Tax Law when, as relevant here, the business sold tangible personal property and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due.¹⁰ (R&TC, § 6829(b); Cal. Code Regs., tit. 18, § 1702.5(b)(1).) As relevant here, personal liability applies only if, while the person was a responsible person for the LLC, the LLC sold tangible personal property and collected sales tax reimbursement on the selling price of the property, but failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).)

Appellant argues that he did not become a responsible person for Ciao’s sales and use tax matters until February 25, 2019, when he took over Ciao’s operations from J. Charity and M. Mulgeci. Appellant asserts that, before February 25, 2019, he was only responsible for managing the kitchen and food service operations as the head chef of Ciao, while J. Charity was responsible for managing sales and use tax matters.

The record shows that J. Charity discussed Ciao’s sales and use tax matters with CDTFA, and Ciao’s seller’s permit application lists J. Charity as the contact person for Ciao’s business activities, as well as the recipient of Ciao’s business mail. However, more than one person can be found to be a responsible person for a business, and it is not OTA’s role to determine whether one responsible person is more or less responsible than another. There is no evidence that appellant’s financial responsibilities for Ciao were limited or absolved. And the record does not include a contract or other agreement explaining J. Charity’s role in the business, and the police report indicates that appellant and J. Charity both stated that no agreement exists.

As noted above, in a member-managed LLC, each member has equal rights in the management and conduct of the LLC, unless otherwise stated in the articles of organization or operating agreement, and every member is an agent of the LLC for the purpose of its business or affairs. (Corp. Code, §§ 17704.07(b), 17703.01(a).) Therefore, appellant had equal rights with M. Mulgeci in the management and conduct of the LLC’s business and affairs, which included

¹⁰ Simply because a person was an officer, member, manager, employee, director, shareholder, or partner of a business is not, in and of itself, sufficient to establish that the person is a “responsible person.” (Cal. Code Regs., tit. 18, § 1702.5(b)(1).)

sales and use tax compliance. In a member-managed LLC, a member manager owes fiduciary duties, such as a duty of care to the LLC, which includes to refrain from “a knowing violation of law.” (Corp. Code, § 17704.09.) This includes compliance with Sales and Use Tax Law, including the paying of tax and filing of returns. Ciao’s operating agreement states that “the limited liability company shall file such tax returns as required by law.” This evidences that, as an LLC member-manager, appellant had broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility was delegated to others. (See *Commercial Sec. Co. v Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.)

While Ciao hired J. Charity to handle Ciao’s sales and use tax matters, J. Charity was a consultant bookkeeper/accountant who was ultimately under the supervision of the member-managers, including appellant. While Ciao’s seller’s permit application lists J. Charity as the contact person for Ciao’s business activities, Ciao’s seller’s permit indicates appellant as an LLC principal, and bankruptcy filings indicate J. Charity as a bookkeeper/accountant. Appellant and M. Mulgeci appointed J. Charity as a consultant to pay bills and gave him bank account authorization, and appellant eventually dismissed J. Charity from Ciao. During the period in which appellant asserts he had no responsibility for sales and use tax matters, the evidence shows that he had control or supervision, or was responsible for sales and use tax compliance. For instance, on July 11, 2018, CDTFA spoke with appellant, who said J. Charity filed the returns, and appellant stated he would communicate with him to file “ASAP,” which further demonstrates that appellant supervised J. Charity with regard to sales and use tax compliance. Based on the foregoing, appellant was a responsible person for Ciao from January 1, 2019, through February 24, 2019.

Willfulness

“Willfully fails to pay or to cause to be paid” means that the failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d); Cal. Code Regs., tit. 18, § 1702.5(b)(2).) This failure may be willful even if it was not done with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) In order to show willfulness, CDTFA must establish all of the following:

- (A) On or after the date that the taxes came due, the responsible person had actual knowledge that the taxes were due, but not being paid.
- (B) The responsible person had the authority to pay the taxes or to cause them to

be paid (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A). A responsible person who was required to obtain approval from another person prior to paying the taxes at issue and was unable to act on his or her own in making the decision to pay the taxes does not have the authority to pay the taxes or to cause them to be paid.

(C) When the responsible person had actual knowledge as defined in (A), the responsible person had the ability to pay the taxes but chose not to do so.

(Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

Knowledge

Appellant took over Ciao's business operations from M. Mulgeci and J. Charity on February 25, 2019, and the evidence indicates that appellant worked and communicated with his father during this time to correspond with CDTFA and keep informed on tax payments and filings. On April 3, 2019, CDTFA stated to appellant's father that payment for 1Q19 was due by April 30, 2019. On April 25, appellant's father stated to CDTFA that he and appellant were working to get funds together for 1Q19. On May 2, 2019, appellant's father and CDTFA discussed the payment for 1Q19, and that appellant could access one of the bank accounts. The taxes for 1Q19 became due and payable on or before April 30, 2019. (See R&TC, § 6451.) Therefore, on or after that date, appellant had actual knowledge that the taxes for 1Q19 were due but not being paid.

Authority

Regarding the second requirement of willfulness, because Ciao was a member-managed LLC, appellant had the authority to pay taxes or cause them to be paid during the entire liability period, including on the date that the taxes came due on April 30, 2019, and when he had actual knowledge that the taxes were due, but not being paid. As stated above, appellant's position as member-manager is evidence that he had broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility was delegated to others, and appellant did not need to obtain approval from anyone prior to paying the taxes at issue.

Appellant took over Ciao's business operations from M. Mulgeci and J. Charity on February 25, 2019. While the complaint states that M. Mulgeci and J. Charity had sole access to all financial account passwords for the company and refused to provide them to appellant, the evidence shows that appellant had authority to withdraw funds from Ciao's bank account.

According to appellant's civil complaint, he unilaterally transferred \$90,000 from Ciao's bank account to a new account before M. Mulgeci and J. Charity were notified of the accusations of embezzlement and before appellant took over operations of Ciao. Appellant asserts in the complaint that the new account ensured he could pay its ongoing bills and expenses. Appellant also signed Ciao business checks, including the \$20,000 payment to CDTFA on March 21, 2019. Furthermore, on May 2, 2019, appellant's father and CDTFA discussed the payment for 1Q19, and that appellant has access to one of the bank accounts. Accordingly, for 1Q19 appellant had the authority to pay Ciao's taxes or cause them to be paid on April 30, 2019.

Ability to Pay

Appellant had the ability to pay taxes when he had actual knowledge that taxes were due but not being paid. Appellant withdrew \$90,000 from Ciao's bank account and deposited those funds into a new bank account around February 25, 2019. Additionally, information obtained from the EDD shows that Ciao paid wages of \$211,085.84 during the second quarter of 2019, from April 1, 2019, through June 30, 2019. Furthermore, Ciao collected sales tax reimbursement on its sales of tangible personal property that it did not pay to CDTA, as conceded, so those funds were available. During the second quarter of 2019, Ciao also paid \$21,305.30 for supplies and \$25,200.44 for rent. At the time Ciao made these payments, appellant had already taken control of Ciao's business operations and knew that Ciao had unpaid tax liabilities for 1Q19. However, appellant chose to pay other liabilities for supplies and wages before paying Ciao's taxes. Therefore, appellant had the ability to pay Ciao's taxes but chose not to do so, and consequently, appellant willfully failed to pay or cause to be paid Ciao's unpaid sales and use tax liabilities during 1Q19.

Based on the foregoing, appellant is personally liable under R&TC section 6829 for Ciao's unpaid liabilities for the period January 1, 2019, through February 24, 2019.

Issue 2: Whether a \$20,000 payment made by Ciao on March 29, 2019, was properly applied.

Appellant argues that the \$20,000 payment was intended to be a prepayment of the LLC's liability for the period February 25, 2019, through March 31, 2019, but that CDTFA misapplied the payment to the 3Q18 liability.

Section 707.020 of CDTFA’s Compliance Policy and Procedures Manual (CPPM)¹¹ discusses how taxpayer payments are applied. When submitting a payment, a taxpayer may include a payment voucher directing CDTFA how to apply the payment. (CPPM, § 707.020.) If the taxpayer does not direct CDTFA how to apply the payment, CDTFA applies the payment to the cost of collection or investigation, if any. (*Ibid.*) Then, CDTFA applies the payment to the oldest period until that period is paid in full. (*Ibid.*) When making a payment online, taxpayers may direct their payment to a specific payment type (e.g., return payment, audit payment, or period payment) or pay the account balance. (*Ibid.*)

Here, appellant paid \$20,000 to CDTFA using a Ciao business check dated March 21, 2019. On March 29, 2019, CDTFA applied the \$20,000 payment to Ciao’s balance for 3Q18. Appellant argues that he intended for the payment to be applied as a prepayment to Ciao’s liability for 1Q19. However, appellant did not submit a payment voucher with the payment, or otherwise indicate on the check how the payment was to be applied. Therefore, CDTFA properly applied the \$20,000 payment to the oldest period for which Ciao had an unpaid balance, in accordance with CDTFA’s own policies and procedures.


¹¹ CDTFA’s CPPM is not binding authority, but an advisory publication created by CDTFA intended to provide direction to CDTFA staff in administering the Sales and Use Tax Law.

HOLDINGS

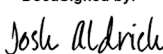
1. Appellant is personally liable under R&TC section 6829 for Ciao’s unpaid sales and use tax liabilities for the period January 1, 2019, through February 24, 2019.
2. The \$20,000 payment made by Ciao on March 29, 2019, was properly applied.

DISPOSITION


Pursuant to CDTFA’s concession, CDTFA’s action is modified to remove the periods October 1, 2018, through December 31, 2018, and April 1, 2019, through June 30, 2019, from the liability period. CDTFA’s action is otherwise sustained.

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 Josh Lambert
 Administrative Law Judge

We concur:
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 Josh Aldrich
 Administrative Law Judge

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 Sheriene Anne Ridenour
 Administrative Law Judge

Date Issued: 4/27/2023