

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

**G. HOENIG,
dba Crestline Cafe**) OTA Case No.: 240415797
) Case ID: 1-947-645
)
)
)**OPINION**

Representing the Parties:

For Appellant:

Thaddeus Allen, Representative

For CDTFA:

Jason Parker, Chief of Headquarters Ops.

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6561, G. Hoenig dba Crestline Cafe (appellant) appeals a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying, in part, appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on April 24, 2020.² The NOD is for tax of \$159,367, plus applicable interest, and penalties³ of \$15,936.73 for the period July 1, 2016, through December 31, 2019 (liability period).

CDTFA subsequently prepared a reaudit, which will reduce the tax to \$105,734 and penalty to \$10,134.65.⁴

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

² The NOD was timely issued because on October 8, 2019, appellant signed a waiver of the otherwise applicable three-year statute of limitations for the period July 1, 2016, through December 31, 2016, which allowed CDTFA until April 30, 2020, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

³ CDTFA applied a 10 percent negligence penalty for the period July 1, 2016, through March 31, 2019, and a 10 percent failure-to-file penalty for the period April 1, 2019, through December 31, 2019.

⁴ CDTFA deleted the 10 percent failure-to-file penalty for the period April 1, 2019, through December 31, 2019.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether further adjustments to the measure of unreported taxable sales are warranted.
2. Whether appellant was negligent.

FACTUAL FINDINGS

1. Appellant, a sole proprietor, operated a restaurant located in Crestline, California, selling hot and cold foods, alcohol and non-alcoholic beverages for dining on site and to-go. Appellant's business was open from 6:00 a.m. to 8:00 p.m., Sunday through Thursday, and 6:00 a.m. to 9:00 p.m., Friday through Saturday. Appellant was issued a seller's permit with an effective start date of January 1, 2013, and closed with an effective close-out date of March 31, 2022. Appellant had not been previously audited.
2. Appellant reported on his sales and use tax returns (SUTRs) total sales of \$1,468,621 and claimed no deductions, which resulted in reported taxable sales of the same amount.⁵ Appellant did not report district taxes on sales after the first quarter of 2018 (1Q18).
3. For audit, appellant provided cash register Z-tapes⁶ for January 2020, and February 20, 2020 (test period). CDTFA made multiple requests for books and records. CDTFA was unable to determine appellant's reporting method because appellant did not provide the requested books and records for the liability period. Thus, CDTFA verified reported taxable sales using an indirect audit method, the credit card sales ratio method.
4. Using Form 1099-K⁷ data for July 1, 2016, through December 31, 2018, CDTFA compiled credit card sales of \$2,199,592. Upon comparison to taxable sales of \$1,372,894 reported on the SUTRs for that period, CDTFA computed a credit card sales

⁵ The SUTRs for the second quarter of 2019 (2Q19) to 4Q19 were filed after the NOD was issued. CDTFA accepted the late filings; thus, total and taxable sales for the liability period were \$2,346,052 (\$1,468,621 for 3Q16 to 1Q19 + \$877,431 for 2Q19 to 4Q19).

⁶ Z-tapes are point-of-sale terminal (register) summaries of transactions. Typically, the terminals can be programmed to provide tapes containing various levels of data, including price, tax, and the method of payment (i.e. cash, check or credit card).

⁷ Form 1099-K is an IRS form titled, "Payment Card and Third Party Network Transactions," which shows the monthly and annual amounts paid to a merchant by a bank, credit card company, or third party network, during a given time period. Form 1099-K data includes payments made by any electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

- ratio of 160.22 percent.⁸ Because credit card sales were more than reported taxable sales, CDTFA performed additional testing to validate reported sales.
5. CDTFA performed an observation test to establish a credit card sales ratio. On Monday, February 24, 2020, CDTFA observed appellant's business for the full business day. CDTFA compiled total sales (excluding sales tax reimbursement [ex-tax]) of \$2,238.85, sales tax reimbursement of \$184.61, credit card tips of \$228.72, and credit card sales (including sales tax reimbursement and credit card tips) of \$1,773.30. CDTFA calculated a credit card sales ratio of 79.21 percent ($\$1,773.30 \div \$2,238.85$).⁹
 6. Using the cash register Z-tapes appellant provided for the test period, CDTFA compiled total sales (ex-tax) of \$78,964.24, sales tax reimbursement of \$6,503.13,¹⁰ credit card tips of \$9,198.78, credit card sales (including sales tax reimbursement and tips) of \$69,596.42, cash sales (including sales tax reimbursement) of \$25,069.73, and total sales (including sales tax reimbursement and credit card tips) of \$94,666.15. CDTFA calculated a credit card sales ratio of 88.14 percent ($\$69,596.42 \div \$78,964.24$).¹¹ CDTFA noted that the results of the observation test were consistent with the cash register Z-tapes. CDTFA concluded that cash register Z-tapes were reliable, and the credit card sales ratio of 88.14 percent was reasonable and representative of the liability period.
 7. CDTFA divided credit card sales of \$2,199,592 for July 1, 2016, through December 31, 2018, by the credit card sales ratio of 88.14 percent to compute audited taxable sales of \$2,495,567.¹² Upon comparison to reported taxable sales of

⁸ CDTFA's Audit Manual (AM) instructs auditors to compute a percentage of credit card sales to total sales to establish the credit card ratio. However, since appellant reported total sales and taxable sales as the same amount, the comparison to taxable sales is acceptable.

⁹ The AM states that total sales are tax included unless it is established that appellant did not collect tax. Thus, the calculation is credit card sales (including tax and tip) of \$1,773.30 divided by total sales (including tax and tip) of \$2,369.50 resulting in 74.84 percent. CDTFA calculated a higher credit card ratio on the observation test, this is in the appellant's favor because it resulted in lower audited taxable sales.

¹⁰ The sales tax rate for 1Q20 for Crestline was 7.75 percent. Based on the Z-tapes, appellant over-collected sales tax reimbursement by charging the wrong sales tax rate ($\$6,503.13 \text{ tax} \div \$78,964 \text{ sales} = 8.24 \text{ percent tax rate}$).

¹¹ Based on the AM, the credit card ratio is calculated by comparing total card payments to total payments ($\$69,596 \div \$94,666 = 73.52 \text{ percent}$). The credit card ratio computed by CDTFA of 88.14 percent is in appellant's favor because it resulted in lower audited taxable sales.

¹² Using a credit card ratio of 73.52 percent, OTA calculates the audited taxable sales ex-tax and without tip (ex-tip) to be \$2,529,525. The credit card sales were \$2,199,592 for 3Q16 through 4Q18.

- \$1,372,894, CDTFA computed unreported taxable sales of \$1,122,673 for July 1, 2016, through December 31, 2018.¹³ CDTFA also computed audited average quarterly taxable sales of \$249,557 ($\$2,495,567 \div 10$ quarters).¹⁴
8. Because Form 1099-K data was not available for 2019, CDTFA concluded that audited average quarterly taxable sales were reasonable and calculated audited taxable sales of \$998,228 ($\$249,557 \times 4$ quarters) for 2019. Upon comparison to reported taxable sales of \$95,727 (SUTRs for 2Q19 through 4Q19 had not been filed, thus, reported sales for these returns were \$0), CDTFA computed unreported taxable sales of \$902,501).¹⁵
 9. Appellant was located in San Bernardino County and his sales were subject to the San Bernardino Transportation Authority (SBER) district taxes of 0.5 percent. CDTFA noted that appellant failed to report any district taxes on sales of \$372,926 from 2Q18 through 1Q19 (appellant did not file SUTRs for 2Q19 through 4Q19). Thus, CDTFA established a separate deficiency measure of \$372,926 for unreported taxable sales subject to the SBER district taxes for 2Q18 through 1Q19.
 10. CDTFA issued an NOD to appellant on April 24, 2020, based on the audit, which disclosed a tax liability of \$159,367, plus applicable interest, and penalties of \$15,936.73.
 11. Appellant filed a timely petition for redetermination (petition) with CDTFA disputing the NOD in its entirety.
 12. After the issuance of the NOD, appellant filed late SUTRs for 2Q19 through 4Q19, reporting taxable sales of \$877,431. As the taxable sales reported on these SUTRs were greater than the measure established in the audit, CDTFA accepted the amounts

First, dividing credit card sales by the credit card ratio ($\$2,199,592 \div 73.52$ percent) results in taxable sales including tax and tip of \$2,991,828. Next removing tips by dividing taxable sales including tax and tip by the tip ratio of 9.72 percent calculated from the Z-tapes ($\$9,199$ tips \div $\$94,666$ total sales) results in taxable sales ex-tip of \$2,726,787. Finally, removing tax by dividing the taxable sales ex-tip by the tax rate (8 percent for 3Q16 and 4Q16, and 7.75 percent for 1Q17 through 4Q18) equals taxable sales ex-tip and ex-tax of \$2,529,525. CDTFA calculated audited taxable sales of \$2,495,567 based on an 88.14 percent credit card ratio. Since CDTFA's calculation results in lower audited taxable sales, this is in appellant's favor.

¹³ Using the audited taxable sales calculated by OTA, the unreported taxable sales for 3Q16 through 4Q18 calculated by OTA are \$1,156,631 ($\$2,529,525 - \$1,372,894$), a difference of \$33,958 ($\$1,156,631 - \$1,122,673$). Since CDTFA's calculation results in lower audited taxable sales for these periods, this is in appellant's favor.

¹⁴ OTA calculates this average to be \$252,953 ($\$2,529,525 \div 10$ quarters). Since CDTFA's calculation results in a lower average, this is in appellant's favor.

¹⁵ OTA calculates the unreported taxable sales for 2019 of \$916,085 ($[\$252,953 \times 4] - \$95,727$). Since CDTFA's calculation results in lower unreported taxable sales, this is in appellant's favor.

reported on the late SUTRs and deleted the audited measure of unreported taxable sales for 2Q19 through 4Q19 (\$249,557 per quarter, or \$748,671). Thus, CDTFA prepared a reaudit to reduce unreported taxable sales for 2019 by \$748,671, from \$902,501 to \$153,830.

13. CDTFA noted that appellant failed to report SBER district taxes on sales of \$877,431 from 2Q19 through 4Q19 on the late filed SUTRs. Thus, CDTFA increased the measure for unreported taxable sales subject to the SBER district taxes to \$1,250,357 (\$372,926 + \$877,431) for 2Q18 through 4Q19.
14. Appellant provided a summary of tips paid to employees for 2017, 2018, and 2019. CDTFA compared employee tips for 2019 to reported taxable sales and computed a tip ratio of 10.38 percent. CDTFA compared employee tips for 2017 and 2018 to the corresponding audited taxable sales and computed tip ratios of 10.81 percent and 10.33 percent, respectively. CDTFA concluded that audited taxable sales for 2017 and 2018 were reasonable since the tip ratios were consistent with the tip ratio based on reported taxable sales for 2019.
15. CDTFA obtained Form 1099-K data for 2019. CDTFA compared credit card sales to reported taxable sales for each quarter. CDTFA noted that for the recently filed SUTRs for 2Q19 through 4Q19, the average credit card sales ratio was 84.48 percent, which was less than the audited credit card sales ratio of 88.14 percent. CDTFA concluded that the audited credit card sales ratio was comparable to the credit card ratio established with the additional Form 1099-K data received after the audit was billed.
16. As a test of reasonableness, CDTFA divided credit card sales of \$2,420,443 for 3Q16 through 1Q19, by the credit card sales ratio of 84.48 percent to compute taxable sales of \$2,865,051. Because the result would be greater than audited taxable sales of \$2,745,124 and detrimental to appellant, CDTFA did not make the adjustment in the reaudit.
17. CDTFA prepared a reaudit report dated September 30, 2020, to reduce the tax to \$105,734 and the negligence penalty¹⁶ to \$10,134.65.

¹⁶ Because CDTFA accepted the late SUTR filings for 2Q19 through 4Q19, it deleted the failure-to-file penalty for those periods. In addition, CDTFA did not apply the negligence penalty to the measure of tax for 2Q19 through 4Q19.

18. CDTFA held an appeals conference with appellant, and subsequently issued a Decision on March 4, 2024, denying the petition in part.¹⁷
19. Appellant timely appealed to OTA.

DISCUSSION

Issue 1: Whether further adjustments to the measure of unreported taxable sales are warranted.

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.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) Although gross receipts from the sale of "food products" are generally exempt from the sales tax, sales of hot food and sales of food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (d)(2), and (d)(7).) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Exemptions from tax are strictly construed against the taxpayer who has the burden of proving that the statutory requirements have been satisfied. (*H. J. Heinz Co. v. State Bd. of Equalization* (1962) 209 Cal.App.2d 1, 4.)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) To satisfy its burden of proof, a taxpayer must prove both: (1) that the tax assessment is incorrect; and (2) the proper amount of tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

Here, upon audit, appellant did not provide adequate books and records to verify that the proper amount of sales tax was charged, collected and reported for the liability period. Due to the lack of original source documentation, CDTFA was unable to verify the accuracy of

¹⁷ CDTFA's Decision denied appellant's petition in part because it takes into consideration the adjustments shown in the reaudit performed by CDTFA.

appellant's SUTRs using a direct audit method, that is, compiling audited sales directly from appellant's records. Thus, it was reasonable for CDTFA to utilize an indirect audit method to compute appellant's sales. CDTFA's use of the credit card sales ratio method as the basis for its determination is a recognized and accepted accounting procedure. (See *Appeal of Amaya*, 2021-OTA-328P.) Furthermore, Form 1099-K data, provided by a third party (merchant processors), is direct evidence of appellant's credit card sales, and thus a reliable source of data from which to establish audited sales. Additionally, a review of the Form 1099-K data revealed that appellant made credit card sales that exceeded appellant's reported total (and taxable) sales. Thus, it was reasonable and rational for CDTFA to conclude that appellant's taxable sales were understated and to use the credit card sales ratio method to determine unreported taxable sales. Therefore, OTA finds that CDTFA has established that its determination was reasonable and rational, and accordingly, the burden shifts to appellant to show errors in the audit.

Appellant contends that the credit card sales ratio method is inaccurate and unrepresentative of his sales. Appellant argues that the January 2020 and February 20, 2020 cash register Z-tapes is unrepresentative because the test period is outside of the liability period. Appellant also asserts that credit card sales included nontaxable transactions related to gunsmithing, donations, and sales of cold food to-go. Appellant reduced credit card sales by his estimated nontaxable sales and computed unreported taxable sales of approximately \$356,980.¹⁸

OTA notes that appellant submitted the following for his agency-level appeal: merchant statements for 2019; a summary of sales for gunsmithing and gun repair business; a summary of cold food (sandwiches) sales to-go; a summary of employee wages and tips; and a letter dated October 31, 2023, from appellant to the Crestline Chamber of Commerce, requesting verification of donations received from appellant.

CDTFA examined the documentation and concluded that it did not support adjustments to the measure of unreported taxable sales because appellant did not submit verifiable source documents. CDTFA computed the credit card sales ratio based on the only source documents provided for audit, appellant's own cash register Z-tapes for the test period. OTA finds that a test using a month of cash register Z-tapes is a sufficiently large enough sample of appellant's sales to establish a representative credit card sales ratio. Appellant has not stated what he

¹⁸ Appellant's calculation of unreported taxable sales is as follows: \$2,119,592 credit card sales per Form 1099-K - \$389,718 (\$24,972 average gunsmithing revenue per year + \$86,376 average cold food sales to-go per year) × 3.5 years) - \$1,372,894 reported taxable sales per SUTRs = \$356,980.

believes is a representative credit card sales ratio for the liability period. Appellant has not provided any documentation from the liability period, such as cash register Z-tapes, with which CDTFA could perform additional testing for the computation of the credit card sales ratio; and unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera, supra.*) CDTFA also used an audited credit card sales ratio of 88.14 percent for 2Q19 through 4Q19, even though appellant's credit card sales and reported taxable sales for that period revealed an actual credit card sales ratio of 84.48 percent, which would result in a larger audited measure. Accordingly, OTA finds appellant has not established a basis to recommend an adjustment to the credit card sales ratio used in the audit.

Appellant's reporting method is unknown. Appellant did not claim any deductions, such as nontaxable sales of food products, on his SUTRs. Appellant has not provided any documentation, such as cash register receipts or sales invoices, to support that credit card sales include nontaxable income related to a gunsmithing business, donations, and sales of cold food to-go. Appellant has not provided evidence of the existence of a separate (unnamed) gunsmithing business. The merchant statements for 2019 reflect daily credit card sales totals but do not include any detailed information to identify whether a credit card sale was revenue from gunsmithing, nontaxable sales of cold food to-go, or taxable hot food and beverage and/or dine-in sales. Appellant's summary of sales for gunsmithing and summary of sales of cold food to-go do not identify the payment transactions, and based on the available records it is not possible to verify whether the amounts were paid by credit card or cash. In addition, appellant has not provided details about the box lunches, and it is not possible to verify whether the box lunches included any taxable items, such as hot sandwiches or sodas. Appellant asserts that he made donations in lump sums. Donations of money, either by credit card or cash, are expenses of appellant. If appellant made any donations of money, those amounts would not be reflected in appellant's credit card sales. Appellant has not provided evidence that his customers donated funds through the use of a credit card. Furthermore, donations of money do not relieve appellant of the tax liability on taxable sales or otherwise reduce taxable sales under the Sales and Use Tax Law. Accordingly, OTA finds no basis to recommend an adjustment to the credit card sales used to determine unreported taxable sales.

Furthermore, there are several errors in appellant's computation of unreported taxable sales. First, credit card sales for 3Q16 through 4Q18 per Form 1099-K data is \$2,199,592, not \$2,119,592. Next, the period 3Q16 through 4Q18 spans 2.5 years, not 3.5 years. Also, appellant fails to apply the credit card sales ratio to credit card sales, and thus, appellant's computation only reflects the difference between reported taxable sales and credit card sales,

not credit card sales and cash sales. Therefore, OTA rejects the assertion that appellant's computation of unreported taxable sales of \$356,980 reflects the proper measure upon which the tax liability should be calculated.

In summary, OTA finds that CDTFA computed audited taxable sales based on the best-available evidence. Appellant has not identified any errors in CDTFA's computation of audited taxable sales or provided documentation or other evidence in support of his contentions from which a more accurate determination could be made. As appellant bears the burden of proof in this case, OTA concludes that no adjustments are warranted.

Issue 2: Whether appellant was negligent.

R&TC section 6484 provides that, if any part of a deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the law or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto. Negligence is generally defined as a failure to exercise such care that a reasonable and prudent person would exercise under similar circumstances. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d. 310, 317; see also *People v. Superior Court (Sokolich)* (2016) 248 Cal. App. 4th 434, 447.) Generally, a penalty for negligence or intentional disregard should not be added to deficiency determinations associated with the first audit of a taxpayer in the absence of evidence establishing that any bookkeeping and reporting errors cannot be attributed to the taxpayer's good faith and reasonable belief that its bookkeeping and reporting practice were in substantial compliance with the requirements of the Sales and Use Tax Law or authorized regulations. (Cal. Code Regs., tit. 18, § 1703(c)(3)(A); see also *Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 321-324.) A negligence penalty is generally justified where errors are continued from one audit to the next. (See *Independent Iron Works, Inc. v. State Bd. of Equalization*, *supra*.)

A taxpayer shall maintain and make available for examination on request by CDTFA, all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of the sales and use tax return. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b).) All records required to be retained under this regulation must be preserved for a period of not less than four years. (Cal. Code Regs., tit. 18, § 1698(i).) Failure to maintain and keep complete and accurate records will be considered

evidence of negligence or intent to evade the tax and may result in penalties or other appropriate administrative action. (Cal. Code Regs., tit. 18, § 1698(k).)

CDTFA imposed the negligence penalty because appellant failed to maintain and provide complete books and records for audit, and the audit disclosed a substantial understatement of taxable sales.

Appellant contends that he acted reasonably and prudently, and that he did maintain his books and records, but he “lost significant data and information in a fire” and was unable to provide books and records to CDTFA due to the unforeseen event. Appellant also asserts that, based on his computations, unreported taxable sales should be approximately \$356,980, which represents an error ratio¹⁹ of only 16.84 percent.

The total measure of unreported taxable sales of \$1,276,503 in the reaudit represents an error ratio of 54.41 percent when compared to appellant’s reported taxable sales of \$2,346,052 for the liability period. As discussed in Issue 1, appellant has not shown that further adjustments to audited taxable sales are warranted. In addition, credit card sales for 3Q16, through 4Q18, alone exceeded total sales reported on the corresponding SUTRs. OTA finds that the large understatement along with the large error ratio are evidence of negligence.

As noted in Issue 1, appellant’s computation of his unreported taxable sales is erroneous and does not support a reduction to the unreported taxable sales; thus, OTA rejects appellant’s assertion that the error ratio is only 16.84 percent.

Regarding the alleged fire that destroyed appellant’s records, appellant has not provided evidence, such as a police or fire department report or insurance report, to support when the fire occurred and what documents were lost or destroyed. CDTFA’s Assignment Activity History (414Z) and Report of Discussion of Audit Findings (CDTFA-836) includes no discussion during the audit fieldwork that appellant’s records had been damaged or destroyed by a fire. Accordingly, OTA finds that appellant’s failure to present complete and adequate records supporting his sales at the time of audit is evidence of negligence.

For the above-mentioned reasons, OTA finds that appellant was negligent and that CDTFA properly imposed the negligence penalty.

¹⁹ The “error ratio” is the percentage of unreported taxable sales to reported taxable sales.

HOLDINGS

1. Further adjustments to the amount of unreported taxable sales are not warranted.
2. Appellant was negligent, and the negligence penalty was properly imposed.

DISPOSITION


CDTFA's action in reducing the determined tax liability to \$105,734 with corresponding reductions to the penalty and interest, but otherwise denying the petition, is sustained.

Signed by:

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Kim Wilson
Hearing Officer

We concur:

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Steven Kim
Administrative Law Judge

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Michael F. Geary
Administrative Law Judge

Date Issued: 2/19/2025