STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KEITH FELDMAN, OFFICER OF ITALIAN PIER RESTAURANT, INC.	:	DETERMINATION
		DTA NO. 811459
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1989 through May 31, 1990.	:	

Petitioner, Keith Feldman, officer of Italian Pier Restaurant, Inc., 1177 McClellan Street, Schenectady, New York 12309, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1989 through May 31, 1990.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 15, 1993 at 9:15 A.M., with all briefs due by March 3, 1994. Petitioner, represented by Donald M. Matusik, Esq., filed a brief on November 4, 1993. The Division of Taxation, represented by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel), filed a brief on February 10, 1994. Petitioner did not file a reply brief.

ISSUE

Whether petitioner was personally liable for sales tax due on behalf of Italian Pier Restaurant, Inc. as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

Italian Pier Restaurant, Inc. ("Italian Pier"), d/b/a Oakwood Inn, was a restaurant located in Troy, New York. In February of 1988, 120 shares of stock in the restaurant were issued to

the following officeholders in the following amounts:[1]

John Leddick, President/Director	- 40 shares
John J. Cioffi, Vice-President/Director	- 20 shares
Michael Cioffi, Treasurer/Director	- 40 shares
Carol J. Cioffi, Secretary/Director	- 20 shares

John Leddick is the brother of Carol J. Cioffi, who is married to John J. Cioffi. Michael Cioffi is the brother of John Cioffi.

During the audit period in question, petitioner, Keith Feldman, worked full time as an assistant vice-president of the Hudson Armored Car & Courier Service, Inc. ("Hudson Armored"). John Leddick, who worked as an assistant to Mr. Feldman at Hudson Armored, convinced petitioner to invest in the restaurant by purchasing his and John Cioffi's shares in the restaurant. Based on a visit to the restaurant and John Leddick's representations, petitioner hoped that once a bar/lounge was constructed, the restaurant would become a profitable investment.

In June of 1988, petitioner agreed to purchase John Leddick's 40 shares and John Cioffi's 20 shares for the total amount of $17,700.00. The actual agreements of sale were dated October 24, 1988. In the respective sale agreements, it was stated that the sale was "contingent upon approval of the New York State Liquor Authority for the amendment to the liquor license."

Petitioner also loaned to Italian Pier $15,000.00 to construct a lounge with a bar next to the restaurant. Petitioner obtained the money by taking out a home equity loan against his house. In return, Carol Cioffi signed a promissory note, dated September 1, 1988, on behalf of Italian Pier agreeing to repay over a five-year period the $15,000.00, plus interest, for the total amount of $19,099.80.

Shortly thereafter, petitioner made a second loan from his personal funds in the amount of $8,000.00 to Italian Pier, at Carol Cioffi's request, in order to pay certain creditors. The

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[1]The number of shares authorized was 200; however, only 120 shares had been issued.

second promissory note, dated October 1, 1988, was again signed by Carol Cioffi on behalf of Italian Pier for $8,000.00 at no interest. According to the note, this amount was to be paid "within a reasonable amount of time."

According to petitioner's testimony, he took the title of president of the restaurant corporation because he was told he "should be president" inasmuch as he owned 50% of the stock issued. He also stated that another reason for his title was that "they said if I was president I would be more secure with my investment because I have a title with the stockholders" (tr., p. 27).

In October of 1988, petitioner signed, on behalf of Italian Pier, an application for a corporate change to the liquor license listing himself as the new president and stockholder. John Leddick and John Cioffi were no longer listed as officers or shareholders. On the application form, petitioner responded "no" to the printed question, "Will you take an active part in the operation of the business to be licensed?" In the investigative report by the Division of Alcoholic Beverage Control concerning the application, it was stated that:

> "Mr. Feldman will maintain his present employment (Assistant Vice-President of Hudson Armored Car & Courier Service, Inc.) and be active only in a management capacity at the licensed premises."

At the hearing held on October 15, 1993, petitioner testified as follows concerning the liquor license application and his position as president and director of the restaurant corporation:

Q. "Did you go to the Liquor Board in Albany?"

A. "Yes, I went there and signed some papers."

Q. "And, again, were you advised by someone to sign those papers?"

A. "Yes, when I went to the Liquor Authority I had asked the question, I explained to them the situation, that I was an investor in the restaurant. She said, are you a shareholder; I said, yes. She said, you have to be put on the liquor license, which I did."

Q. "The SLA or ABC person from the State of New York so advised you?"

A. "Correct. The lady that was at the counter."

Q. "At that time were you involved in any of the operations whatsoever of the

Oakwood Inn?"

A. "No, I just thought I had to be on the liquor license." (Tr., pp. 35-36.)

* * *

Q. "Did there come a time when you became aware that you had been appointed a Director of the corporation?"

A. "Yes."

Q. "And how did that transpire?"

A. "At the time of application for the liquor license they asked, they told us we had to put down who the officers were. And I explained to them that I was, I had 60 shares of stock. And he said, you have to put yourself down as an officer. And that's when I spoke with Carol and it was agreed upon that since I had the 60 shares I would be down as president and her as the secretary, since she wrote out the checks."

Q. "Do you recall ever having a shareholders meeting with this corporation concerning any documents, or waiving a meeting?"

A. "No." (Tr., pp. 67-68.)

On the checking account signature cards for Italian Pier, petitioner signed and was listed as one of the persons who could make withdrawals on behalf of the restaurant. Petitioner testified that he signed the signature cards because he was asked to and that Carol Cioffi explained to him that Michael Cioffi "was never around" so that if anything happened to her, petitioner could make withdrawals.

Petitioner testified that he was not involved in any of the everyday operations of the restaurant and that, instead, Carol Cioffi managed the restaurant. He stated that his only contact with the restaurant besides the liquor license application and signature cards was to visit the restaurant a couple of times a month on weekends for dinner. The nature of these visits was described by petitioner as follows:

Q. "When you went there for dinner were you offered any information about the operation or management interest of the business?"

A. "No. I just asked how things were going."

Q. "Well, let's inquire or stop at this point. Did you from time to time make any inquiry as to how the business was going?"

A. "At the time when I went there for dinner I would see Carol Cioffi and I

would just, she'd sit down with me for a few minutes and I would ask how things were going."

Q. "Did you ever get any money from them?"

A. "No. They made a couple payments on that promissory note to the bank that we, that she had signed and I signed for the home equity loan."

Q. "Did you ever inquire whether or not the taxes were being paid?"

A. "No. Because I wasn't aware that it was out of hand like that." (Tr., pp. 51-52.)

* * *

Q. "Did you ask her specifically about whether the business was making money?"

A. "No. I just asked in general how things are going, what's going on. I didn't get into specifics."

Q. "So you never asked her specifically whether there's a problem with any of the bills of the corporation or whether they were falling behind or anything?"

A. "No. She didn't tell me that. The only thing she said was the time when she needed the eight thousand dollars, she inquired about that and said that if they had some more money they'd get caught up. And once the lounge got set up and started we'd be in good shape."

Q. "So at the time that she requested you invest the eight thousand she did indicate to you there were some financial problems?"

A. "At that time, yes. That was prior to the lounge being put up."

Q. "Did you inquire about the nature and the scope of the financial problems?"

A. "She had said that -- yes, I did ask, and she had said they had owed, the seafood vendor had to be paid and a produce vendor had to be paid and the rent had to be paid."

Q. "Did you at that point in time ask to see the books and records of the corporation to see if there were any other outstanding liabilities?"

A. "No."

Q. "Why not?"

A. "I just didn't. I just didn't. I took her word that that is what the problems were."

Q. "Did you ask her whether all of the employee withholding taxes were being paid on time?"

A. "No."

Q. "Did you ask her whether the corporation's taxes were being paid on time?"

A. "No. I never discussed taxes with her until I started finding out that they weren't paying them."

Q. "Did you ask her why the corporation wasn't making enough money to pay its bills even to the vendors?"

A. "The answer I got was once, because of the lounge, people want to come in and have a drink and once the lounge was built we'd be able to have people come in, sit down, have a drink prior to dinner. So the big push was getting the lounge set up."

Q. "Were you ever denied access to any of the corporate books or records?"

A. "I never asked, so I guess I would imagine I wouldn't be denied. But I didn't ask. You know, I thought it was a simple run a restaurant, you know, type thing." (Tr., pp. 72-74.)

During the audit period in question, petitioner worked on a full-time basis for Hudson Armored first in Albany, and then in February of 1989 he was transferred to the Poughkeepsie office. According to his testimony, once petitioner was transferred, he visited the restaurant on a less frequent basis or on the average of once a month. Petitioner testified that he had no experience in the restaurant business prior to his investment and that his responsibilities at Hudson Armored included the day-to-day operations such as the dispatching of trucks, security and other personnel issues, but did not involve any of the finances of the company.

Petitioner testified that in April or May of 1990, John Leddick, with whom petitioner spoke on the telephone daily with respect to the armored car business, informed petitioner by telephone that the restaurant was closing. Although John Leddick was no longer involved with the restaurant, he kept in regular contact with his sister, Carol Cioffi, and based on this contact he was aware of the restaurant closing. The restaurant closed on April 15, 1990. When petitioner became aware of the closing, he inquired about his investment and was informed by Carol Cioffi that she was going to pay certain creditors and employee payrolls first. Petitioner never received any dividends or any other return on his investment and also received only a few payments on his two loans prior to the restaurant closing. Petitioner stated that he did not know what happened to the corporate assets.

The Division of Taxation ("Division") issued to petitioner, as a corporate officer of

Italian Pier, five notices of determination and demands for payment of sales and use taxes due, dated March 8, 1991, in the following amounts:

Period Ending	Tax Due	Penalty	Interest	Total Amount
5/31/89[2]	$6,963.30	$1,821.43	$1,288.51	$10,073.24
8/31/89	5,234.46	1,203.87	778.86	7,217.19
11/30/89	2,502.74	853.53	443.02	3,799.29
2/28/90	5,324.69	905.18	438.97	6,668.84
5/31/90	8,766.62	1,139.66	308.39	10,214.67

The sales tax deficiencies with respect to the first four quarters were based on returns filed by Italian Pier without remittance of the tax. Italian Pier did not file a sales tax return for the last quarter it was in operation. Thus, in contrast to the notices for the first four quarters, sales tax asserted in the notice for the quarter ending May 31, 1990 was based on the Division's estimation of sales tax due. However, the Division submitted no evidence concerning how the taxes for the last quarter were estimated.

Petitioner testified that his first knowledge of the outstanding sales tax liabilities was by notice from the Division and that, after seeking advice and explanation from the Division, he made two payments in the amount of $1,000.00 and three payments in the amount of $50.00.

Petitioner submitted a District Office Case Activity Sheet from the Tax Compliance Division verifying that petitioner made payments of $1,000.00 and $50.00 in June of 1990 with respect to Italian Pier. Petitioner explained the reason for making those payments as follows:

> "[J]ust so you understand why I gave the thousand dollars and started making payments, I worked for Hudson Armored Cars, I was the operations manager. I had access to roughly forty-five million dollars in currency; not myself, but I could go into the vault without being supervised and open up cabinets that had currency in it. They didn't look kindly on people who had problems with the State or have problems with their finances, or whatever you want to call it. They periodically did credit checks on the employees that had access to all this money.

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[2]The copy of the notice for this period mistakenly has printed on it the wrong tax period of 5/31/90 instead of 5/31/89. There is no challenge to this notice for the error. The notice attached to the petition has the printed date of "5/31/90" crossed out and above which is the handwritten notation "5/31/89".

> "I felt my job would be at stake if they found out I owed all this money, and then if something turned up missing in the vault they would look at me. So, I was there ten years at the time this all started and I just didn't want to lose my job. And even though my credentials were I was a good worker and all that, they would still look at me if something came up missing in the vault. And things did come up missing in the vault periodically. But I was in fear of losing my job. So I started making some payments. And I had assumed and thought, which I shouldn't have, that the other officers would make some kind of payments to try to get this resolved. And they didn't." (Tr., pp. 43-44.)

Petitioner also stated that at the time of these payments he had not sought the advice of a lawyer.

A conciliation conference was held on May 11, 1992 and the conferee issued a Conciliation Order, dated September 11, 1992, sustaining the five statutory notices.

Petitioner testified that Mr. Pauquette, who represented the Division at the conciliation conference, advised petitioner that because no sales tax return was filed for the last quarter and the sales tax asserted in the notice for the last quarter was estimated, he might be able to reduce that amount by filing a tax return with documentation for that quarter. Thus, petitioner signed and filed a sales tax return on behalf of Italian Pier for the quarter ending May 31, 1990. According to that return, which was dated December 8, 1992, the amount of sales and use tax owed for that quarter was $633.92, in contrast to the $8,766.62 estimated in the notice of determination. Petitioner testified that he based the information provided in that return on the only records he could recover from Carol Cioffi. Ultimately, he used the checking account statements to reconstruct the amount of tax due.

Petitioner filed a petition, dated December 8, 1992, along with the tax return for the quarter ending May 31, 1990, arguing that: (1) copies of the bank records indicated that the amount owed for that quarter was only $633.92; (2) the Division had not reflected in the balance due monies collected from the other principals of the corporation; and (3) that he was not a person required to collect tax as defined in Tax Law § 1131(1) because he:

> "never received a single penny from the corporation as salary, wages, dividends, profits or interest, . . . never wrote a check from the corporation's account [and] never participated in the day to day operation of the business, nor was kept informed of same."

The Division filed an answer, dated February 26, 1993, stating, inter alia, that no sales

tax return was filed for the quarter ending May 31, 1990; that the amount assessed for that quarter was based upon the corporation's reported sales tax figures for the previous quarters; and that petitioner has the burden of proving that the Division's assertion of tax was erroneous or improper.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that he does not meet the definition of a "person required to collect tax" within the meaning of Tax Law § 1131(1) because he performed no services for the corporation, was not involved in the daily operations of the business and, with the exception of the return for the last quarter, was not involved in preparing or signing sales tax returns or the payment of sales tax. He notes instead that he was merely an investor in the corporation who never recovered his investment and received no salary, wages, profits or other compensation from the corporation. He further contends that he made a good faith effort to learn of unpaid taxes by periodically asking the active principals whether the corporation's operating expenses, including sales taxes, were being timely paid. He claims that when the corporation ceased operating, he inquired about what was owed and was misinformed that only the landlord and certain suppliers remained unpaid. Petitioner portrays himself as a victim who was induced to invest in the business with promises of repayment that were never fulfilled and who was not provided with the financial records of the corporation or the truth about the business by the other principals.

Finally, petitioner asserts that payment of the tax has probably been received from other principals but has not been credited and, therefore, the Division should provide petitioner with updated information as to payments received.

In its brief, the Division stated that it has accepted petitioner's late-filed, non-remit return for the last quarter of March 1, 1990 through May 31, 1990, subject to audit and verification within the three-year statute of limitations. Therefore, the Division stated that the tax amount asserted in the notice for that last quarter has been reduced to the $633.92, plus penalty and interest, as reflected in the filed tax return.

With respect to petitioner's responsible officer status, the Division contends that a taxpayer's authority to act on behalf of a corporation is an important factor in determining his responsibility for sales tax and that this responsibility cannot be absolved by delegating his authority over the corporation's financial affairs to others. Relying on petitioner's ownership of 50% of the outstanding stock, his loans to the corporation, his position as president and the fact that petitioner was authorized to make bank withdrawals on behalf of the corporation, the Division argues that petitioner had sufficient control over the financial matters of the corporation to be liable for the sales tax owed. The Division further argues that petitioner's failure to exercise that control does not extinguish his responsibility for ensuring that taxes be paid on behalf of the corporation.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article." Tax Law § 1131(1) defines "persons required to collect tax" as "any officer, director or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

In determining whether an individual is personally liable under these statutes, consideration must be given to the particular facts in each instance (20 NYCRR 526.11[b][2]; see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). The fact that an individual was an officer of the corporation does not in itself make that individual personally liable (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 537, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427; Matter of Constantino, supra). The question is whether the officeholder had a "duty to act" for the corporation or had or could have had sufficient authority and control over the affairs of the corporation to be considered a

responsible officer or employee. Thus, a variety of factors are considered such as: the individual's status as an officer; the individual's knowledge of and control over the financial affairs and management of the corporation; the individual's day-to-day responsibilities; the authority to write checks on behalf of the corporation; the authority to hire and fire employees; whether the individual prepared, filed or signed tax returns for the corporation; and the individual's economic interest in the corporation (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d at 565; Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d at 538; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d at 865; Matter of Constantino, supra; Matter of Autex, Tax Appeals Tribunal, November 23, 1988). While no one factor is controlling, all must be considered (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186) and petitioners have the burden of overcoming the tax assessment (Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799; Matter of Malkin v. Tully, supra).

In this case, petitioner was the named president of the corporation based apparently upon his economic interest in the corporation. Petitioner not only owned 50% of the outstanding stock in the restaurant, he also loaned the corporation $23,000.00 -- a sum which exceeded by more than $5,000.00 his initial purchase price of the stock. Therefore, petitioner's economic investment in the restaurant was substantial.

Petitioner argues that his involvement with the restaurant was primarily limited to his economic investment and that he took the title of president on the advice of others for the purpose of applying for an amendment to the liquor license. He further argues that he had no involvement in the everyday operations of the business, did not prepare or sign sales tax returns, had no knowledge or control over the finances of the business, and was misinformed when he inquired about the restaurant's finances. Citing Chevlowe v. Koerner (supra) and Vogel v. New York State Dept. of Taxation & Fin. (supra), petitioner argues that he was merely an investor and passive officer of the corporation who was not personally liable for the collection and payment of sales taxes.

Neither the case law nor record evidence supports petitioner's position. There is no evidence to support petitioner's claim that he had no authority to control the finances of the corporation or that he was misled or misinformed about the business' finances. From his testimony, it would appear that petitioner's unfortunate predicament resulted from the same lack of care that he afforded his investment. Petitioner was aware that the business was not operating at a profit and risked substantial cash amounts on the notion that once a lounge was constructed, more customers would be attracted to the restaurant. Petitioner apparently took on this risk without examining the financial status of the business and continued to risk further monies without making any serious inquiries into the operation or finances of the business. According to his testimony, petitioner would casually ask Carol Cioffi, who managed the business, "how things were going" once or twice a month when he visited the restaurant for lunch or dinner. Despite the fact that he was aware that vendors were owed money and his own loan payments were not made, petitioner showed little concern over the business' finances. He testified that he did not inquire whether taxes were being timely paid. From the record evidence, it would appear that petitioner's lack of knowledge and control over financial matters was by choice and was not a question of lack of authority or misinformation. There is no evidence that petitioner was prevented by other officers or shareholders from exercising that authority or taking any action with respect to taxes due (compare, Matter of Moschetto, Tax Appeals Tribunal, March 17, 1994; Matter of Turiansky, Tax Appeals Tribunal, January 20, 1994). Petitioner had the authority to withdraw funds on behalf of the corporation and when questioned whether he was ever denied access to any of the corporate books or records, petitioner responded that he never asked to see them (see, Finding of Fact "10"). Petitioner also testified that he was elected president because "they said if I was president I would be more secure with my investment because I have a title with the stockholders" (see, Finding of Fact "6"). This statement and the fact that petitioner was a 50% stockholder (whereas Carol Cioffi was a 16.6% stockholder), supports the notion that petitioner had as much control over the business as he might choose to exercise. Unfortunately, he chose not to concern himself with

the corporate finances in any responsible manner.

In cases where the taxpayer was the sole shareholder and officer, it has been held that he or she had the legal authority and duty to act on behalf of the corporation and, therefore, should be held liable for taxes due notwithstanding the fact that the taxpayer may not have exercised actual control over the corporation (Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Blodnick v. New York State Tax Commn., supra; Matter of Marvin H. Mason, Inc., Tax Appeals Tribunal, July 29, 1993; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). Similarly, failure of an officeholder, who is one of several officeholders, to exercise his or her share of the responsibility by leaving such duties for someone else to discharge, does not absolve the taxpayer from tax liability (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of Roberto, Tax Appeals Tribunal, December 1, 1988; compare, Matter of Roncolato, Tax Appeals Tribunal, August 15, 1991). Based on the above case law and the evidence or lack thereof in this record, petitioner is a "person required to collect tax" within the meaning of Tax Law § 1131(1).

Petitioner's reliance on Chevlowe v. Koerner (supra) and Vogel v. New York State Dept. of Taxation & Fin. (supra) is misplaced. The facts in Chevlowe are distinguishable. In that case, the taxpayer was an officer whose control over the corporate finances was limited after a corporate merger and Receivor had been appointed. Moreover, unlike petitioner, there was no finding in Chevlowe that the taxpayer was a shareholder as well as officer. The decision in Vogel is also unpersuasive in light of the more recent case law. In Vogel there was no discussion as to whether the taxpayer/officer was prevented from exercising his or her authority to control the corporate finances or whether the taxpayer simply delegated that authority to others.

In sum, as a 50% shareholder and president of the corporation, petitioner had both the fiduciary duty and authority to act on behalf of the corporation. Unless the taxpayer can show that circumstances existed that interfered with his exercise of that duty or authority, he is a

person responsible for the collection and payment of sales tax. Petitioner has made no such showing and, instead, has presented a case showing that he relied on others to perform his duty as president. As a consequence, he cannot avoid tax liability due to the conduct of those he relied on (see, Matter of Martin v. Commr. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn., supra; Matter of Marvin H. Mason, Inc., supra; Matter of Baumvoll, supra; Matter of Roberto, supra).

B. Petitioner claims that payments from other principals have probably been received by the Division and, therefore, the Division should provide petitioner with updated information as to the payments received. To the extent that petitioner is requesting a directive that the Division provide him with this updated information, such relief is beyond the jurisdiction of the Division of Tax Appeals (see, Tax Law §§ 2006, 2008) and must be sought directly from the Division of Taxation.

C. The petition of Keith Feldman is denied and the notices of determination, dated March 8, 1991, for the period March 1, 1989 through February 28, 1990, are sustained.

D. The amount of tax due in the notice of determination, dated March 8, 1991, for the period March 1, 1990 through May 31, 1990 is reduced to $633.92, as asserted by the Division, and the penalty and interest should be reduced accordingly.

DATED: Troy, New York
August 4, 1994

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE