

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
HILLARY HULTEEN
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
December 1, 2015 through May 31, 2018.

DECISION
DTA NO. 830051

Petitioner, Hillary Hulteen, filed an exception to the determination of the Administrative Law Judge issued on January 13, 2022. Petitioner appeared by Sales Tax Defense LLC (Mark L. Stone, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on April 18, 2022, the date of petitioner's letter stating that no reply brief would be filed.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of

fact 1 and 2, which we have modified to more accurately reflect the record. The findings of fact as determined by the Administrative Law Judge and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) brought a motion dated September 13, 2021, seeking summary determination in the present matter. The subject of the Division's motion is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Hillary Hulteen, in protest of a notice of determination, dated March 20, 2020, and bearing assessment ID number L-051347885 (notice). The notice assessed sales and use taxes for the period December 1, 2015 through May 31, 2018. It was issued to petitioner as an officer or responsible person of Lafayette Glass Company Inc., "for taxes determined to be due in accordance with sections 1138 (a), 1131 (1), and 1133 of the New York State Tax Law." The notice is addressed to "HULTEEN-HILLARY" at an address in West Islip, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0120 9415.

2. A copy of the notice was also sent to petitioner's representative, Christopher Kelly, under a mailing cover sheet that bore certified control number 7104 1002 9730 0120 9378 and the following address:

"CHRISTOPHER KELLY
ANCHIN, BLOCK & ANCHIN LLP
ANCHIN-1375 BROADWAY
NEW YORK, NY 10018."

This is the same address, and the last known address, for petitioner's representative that is listed on the power of attorney signed by petitioner on January 1, 2020.

3. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner's representative, Mark L. Stone, CPA, and was dated June 26, 2020. The request was faxed to and received by BCMS on June 29, 2020.

4. On September 4, 2020, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000321199) to petitioner. The conciliation order determined that petitioner's protest of the subject notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on March 20, 2020, but the request was not faxed until June 29, 2020, or in excess of 90 days, the request is late filed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on September 10, 2020.

6. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated September 13, 2021, of Lori P. Antolick, Esq., the Division's representative; (ii) an affidavit, dated August 26, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record For Presort Mail – Assessments Receivable” (CMR) postmarked March 20, 2020; (iv) an affidavit, dated August 26, 2020, of Susan Saccocio, a manager in the Division's mail room; (v) copies of the notice mailed to petitioner and her representative with the associated mailing cover sheets; (vi) a copy of the power of attorney form, dated January 1, 2020, authorizing Mr. Kelly to represent petitioner with respect to “[a]ll tax types” for “[a]ll tax periods,” that listed Mr. Kelly's New York, New York, address; (vii) a copy of petitioner's request for conciliation conference; and (viii) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2018, electronically filed on October 15, 2019, which lists the same West Islip, New York,

address for petitioner as that listed on the notice, the request for conciliation conference and the petition,¹ except that petitioner's address on the notice includes an additional four zip code digits to petitioner's five-digit zip code. According to the affirmation of Ms. Antolick, the 2018 resident income tax return was the last return filed with the Division by petitioner before the notice was issued.

7. Attached to Ms. Antolick's affirmation is a copy of the power of attorney form on file with the Division when the notice was issued. On the power of attorney form, petitioner's representative's address was listed as Christopher Kelly, Anchin, Block & Anchin, Anchin-1375 Broadway, New York, NY 10018. It is noted that on the power of attorney appointing Mr. Kelly as her representative, petitioner's same West Islip, New York address had the street abbreviated as "Davison LN E", and included an additional four zip code digits to petitioner's five-digit zip code.

8. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is

¹ The street name of petitioner's address is spelled out as Davison Lane East on the request, the petition, and the Stone power of attorney; however, it is abbreviated as "Davison LN E" on the notice and petitioner's 2018 income tax return.

expressed as the year, Julian day of the year, and military time of day, in this case “20200740640.” Following the Division’s general practice, this date was manually changed on the first and only page of the CMR in the present case to “3/20/20.” In addition, as described by Ms. Picard, the CMR for the notices issued on March 20, 2020, including the notice issued to petitioner and her representative, consists of one cut sheet page. The page number of the CMR is noted in the upper right corner of page as “PAGE: 1.”

9. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street, and PO Address.”

10. The CMR in the present matter consists of one page and lists 5 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A United States Postal Service (USPS) employee affixed a postmark dated March 20, 2020 to the one-page CMR. Beneath the preprinted heading “Total Pieces Received at Post Office,” the USPS employee handwrote “5” and initialed or signed the one-page CMR.

11. The one-page CMR indicates that a notice with certified control number 7104 1002 9730 0120 9415, and reference number L-051347885 was mailed to petitioner at the West Islip, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and petitioner's name and address as noted.

12. The one-page CMR also indicates that a notice with certified control number 7104 1002 9730 0120 9378, and reference number L-051347885 was mailed to petitioner's representative, Christopher Kelly, at "ANCHIN-1375 BROADWAY, NEW YORK, NY 10018." The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and the following name and address:

"CHRISTOPHER KELLY
ANCHIN, BLOCK & ANCHIN LLP
ANCHIN-1375 BROADWAY
NEW YORK, NY 10018."

13. The affidavit of Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany,

New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, the one-page CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark of March 20, 2020 and the USPS employee’s initials or signature. On the one-page CMR, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 5 and beneath “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten entry “5,” indicating five pieces of mail were received by the USPS.²

14. According to the Picard and Saccocio affidavits, copies of the notice were mailed to petitioner and her representative on March 20, 2020, as claimed.

15. In opposition to the Division’s motion for summary determination, petitioner submitted the affirmation of her representative, Mark L. Stone, CPA, with two attachments: a copy of “[a] message from Commissioner Schmidt on our efforts to combat COVID-19 March 20, 2020 (afternoon)” (attachment A), and a copy of the Division’s affidavit of Susan Saccocio, dated August 26, 2020, (attachment B). Mr. Stone, in his affirmation, made claims regarding the presence of “Tax Department” employees in its offices beginning March 16, 2020, and Commissioner Schmidt’s “directive to reduce in office staff.”

16. The text of the “message from Commissioner Schmidt on our efforts to combat COVID-19 March 20, 2020 (afternoon)” follows:

“Colleagues:

We continue to respond to the COVID-19 challenge.

² The illegible initials or signature of the USPS employee appear to the right of the handwritten number “5.”

Beginning on this Monday, March 23, 2020, we will be reducing our on-site staffing to critical functions.

These critical functions, listed below, are related to the department's COVID-19 response efforts and certain depository and return processing operations.

All other work units will work entirely from remote locations, without charge to accruals. All of us must do what we can to advance the mission of the department and interests of the State during these challenging times.

Again, this directive will begin on Monday and remain in effect until further notice.

Managers and supervisors should communicate this directive to staff before the close of business today.

Thank you for your cooperation, and for your continued dedication and professionalism.”

It is noted that the copy of Commissioner Schmidt's message, attached to Mr. Stone's affirmation, appears to be a redacted copy of a longer message.³

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by reviewing the standards for granting a motion for summary determination, noting that such a motion shall be granted if it has been shown sufficiently that no material and triable issue of fact is presented.

Next, the Administrative Law Judge addressed the statute of limitations for protesting a notice of determination, noting that a petition must be filed within 90 days from the mailing of such notice. Alternatively, according to the Administrative Law Judge, a taxpayer may contest a notice of determination by filing a request for a conciliation conference if the time period for filing a petition has not yet elapsed. The Administrative Law Judge noted that the statutory time limit for filing a petition or requesting a conciliation conference is strictly enforced because,

³ Commissioner Schmidt's message states that critical functions are listed below. However, the copy in the record does not include the list of critical functions.

without a timely protest of a notice of determination, such notice becomes a fixed and final assessment. The Division of Tax Appeals would lack jurisdiction to consider the merits of the protest in such a case.

The Administrative Law Judge then noted that when the timeliness of a request for conciliation conference or a petition is at issue, the Division has the burden to establish the fact and date of mailing of a notice or notices to petitioner's last known address. She noted that in order for the Division to meet its burden, it must show proof of a standard procedure for mailing such notices and that such procedure was followed in the particular case being reviewed.

The Administrative Law Judge found that the Division's properly completed CMR constituted highly probative evidence of the date and fact of mailing. The affidavits by the Division's employees were found to adequately describe the Division's mailing procedure and the CMR and thus, according to the Administrative Law Judge, established that the mailing procedure was followed in this case. The Administrative Law Judge also found that the address for petitioner on the mailing cover sheet and CMR conform with the address listed on petitioner's filed 2018 resident income tax return, which satisfies the last known address requirement for mailing a statutory notice. The Administrative Law Judge also determined that the evidence demonstrated that the notice was also properly mailed to petitioner's representative at his last known address.

The Administrative Law Judge rejected the affirmation submitted by petitioner's representative as having no evidentiary value, as the representative is a certified financial accountant, which is not a category of individual authorized to submit affirmations pursuant to the CPLR. She also determined that the written message from the Commissioner that was attached to the affirmation contains no information that would support any claim that the

Division's standard mailing procedures were affected by COVID-19 on the issuance date of the notice.

Finding that the Division demonstrated proper mailing of the notice on March 20, 2020, the Administrative Law Judge concluded that petitioner's conciliation conference request was untimely filed and properly dismissed by the conciliation order issued by BCMS. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination, denied the petition and sustained the conciliation order dismissing petitioner's request for a conciliation conference.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that the COVID-19 emergency impacted the operations of the Division, which, in turn, raises questions of fact as to whether the standard procedures for the mailing of notices were followed on March 20, 2020, and whether they were followed when mailing the notice to petitioner, specifically. Petitioner alleges that the Administrative Law Judge gave great weight to the affidavits of mailing submitted by the Division and that she failed to give sufficient weight to the written message of the Commissioner regarding reduced office staffing as a result of the COVID-19 emergency. Petitioner contends that she should be permitted to question the staff person on duty the day the notice was mailed to her address to determine if the standard procedures were, in fact, followed.

The Division maintains that the Administrative Law Judge properly concluded that petitioner failed to timely request a conciliation conference with BCMS following the proper issuance of a notice of determination to petitioner and thus the Division of Tax Appeals lacks jurisdiction to consider the merits of the matter. The Division argues that it has met its burden of proving the fact and date of mailing of the notice to the taxpayer's last known address, namely

through the submission of a properly completed CMR and affidavits in support of its motion. The Division also argues that petitioner's assertions that the Division may not have followed its standard mailing procedures and may not have been properly staffed due to the COVID-19 pandemic are baseless. It asserts that the Administrative Law Judge properly determined that there is nothing in the March 20, 2020 message from the Commissioner to support a contention that the Division's mailing procedures were affected by the COVID-19 emergency.

OPINION

We note that the petition in this matter was filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation order dismissing petitioner's request for a conciliation conference and, as such, the Division of Tax Appeals has jurisdiction over the petition (*see* Tax Law §§ 170 [3-a] [a], [e] and 2006 [4]; *Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991).

A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212 (20 NYCRR 3000.9 [c]). Thus, the movant for summary determination "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a material or triable issue of fact, or where an issue of

fact is arguable (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ . . .” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] quoting *Zuckerman v City of New York*, 49 NY2d at 562).

Tax Law § 1138 (a) (1) authorizes the Division to mail a notice of determination to a person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (*see* Tax Law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of that notice by the person to whom it is addressed (*id.*). With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (Tax Law § 1138 [a] [1]). A person also has the option of commencing an administrative challenge to such notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (*see e.g. Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

Where, as here, the timeliness of a taxpayer’s request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact

and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

We agree with the Administrative Law Judge's conclusion that the Division's proof establishes that the notice here at issue was mailed to petitioner's last known address and to the address on file for petitioner's representative on March 20, 2020. We find that the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue. We also agree with the Administrative Law Judge's determination that the CMR was properly completed and, together with proof of the Division's standard mailing procedure, constitutes highly probative evidence of both the fact and date of mailing of the subject notice (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015; *Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

Specifically, the one-page CMR lists the certified mail control number corresponding to each notice's cover sheet, petitioner's name and address, an assessment ID corresponding to each notice, a dated postmark and the initials of the postal employee accepting the articles of mail

listed on the CMR. According to the CMR, there was a total of five items delivered into the possession of the USPS on March 20, 2020, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote “5” on the page and initialed the page. Additionally, the address listed for petitioner on the mailing cover sheet and CMR entry is the same as the address listed on petitioner’s 2018 filed New York State income tax return. This satisfies the last known address requirement in Tax Law § 1138 (a) (1). While the Division added four additional zip code digits to the zip code reflected on petitioner’s 2018 filed resident income tax return, petitioner does not contend that the four digits were incorrect for his address. Given this apparently correct use of the USPS’s ZIP + 4 code, we find that the Division was merely facilitating the “efficient mail processing” of the notice by the USPS (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001, quoting USPS Domestic Mail Manual, Issue 56, §§ A010.2.1, 2.2).

Furthermore, while the Tax Law does not specifically provide for service of a notice on a taxpayer’s representative, the Tax Appeals Tribunal has held that the 90-day period for filing a challenge to a notice issued by the Division is tolled if the taxpayer’s representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996, *citing Matter of Bianca v Frank*, 43 NY2d 168 [1977]). The address listed for petitioner’s representative on the mailing cover sheet and CMR is the last known address as listed on the power of attorney that petitioner filed with the Division of Tax Appeals. The Division thus properly mailed the notice at issue to petitioner and petitioner’s representative on March 20, 2020, and the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date

(Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). Petitioner's request for conciliation conference is dated June 26, 2020. It was faxed to and received by BCMS on June 29, 2020 and, thus, deemed filed on that date (*see* 20 NYCRR 4000.7 [a] [1] [iii]). As such, the request was untimely and properly dismissed by BCMS.

We, therefore, agree with the determination of the Administrative Law Judge that the Division has, through its moving papers, demonstrated proper mailing of the notice at issue, which, absent contrary evidence, raises a presumption of receipt by petitioner (*see* Tax Law § 1147 [a] [1]; *Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]; *Matter of Kayumi*, Tax Appeals Tribunal, June 27, 2019). Petitioner is entitled to rebut that presumption by demonstrating that the standard mailing procedure was not followed or that the procedure was performed so carelessly that it would be unreasonable to assume that the notice was mailed (*see Matter of T.J. Gulf, Inc. v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]).

In reviewing the evidence submitted by petitioner, we are mindful that the facts must be viewed in the light most favorable to the nonmoving party (*Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574, 587 [1986]). In opposition to the Division's motion, petitioner submitted the affirmation of her representative, a certified public accountant, and two exhibits attached to that affirmation. We note first that pursuant to CPLR § 2106, only attorneys, physicians, osteopaths, dentists and individuals physically located outside the United States are authorized to submit affirmations. In light of CPLR § 2106, the Administrative Law Judge determined that the affirmation of petitioner's representative has no evidentiary value. The Division in the proceeding below, however, did not object to the fact that Mr. Stone submitted an affirmation as opposed to an affidavit, and in the absence of a showing of prejudice

by the Division (*see* CPLR § 2101), Mr. Stone's affirmation may be accepted (*see Gentle Acupuncture, P.C. v Tri-State Consumer Ins. Co.*, 55 Misc 3d 147(A) [App Term, 2d Dept, 9th & 10th Jud Dists 2017]).

In any event, the substance of the affirmation submitted by petitioner's representative demonstrates that he has no personal knowledge of the facts regarding the mailing of the notice of determination and thus the affirmation lacks any evidentiary value. In the affirmation, petitioner's representative alleges that the Division's normal operating procedures were changed by the COVID-19 emergency and that Division staff was directed to work from home. In support of those allegations, petitioner's accountant submitted a purported "Message from Commissioner Schmidt on our efforts to combat COVID-19," dated March 20, 2020, which indicates that beginning Monday, March 23, 2020, the Division would reduce its on-site staffing to critical functions only. The affirmation further alleges "upon information and belief," but without substantiation, that the Division actually began to reduce office staff in response to the COVID-19 pandemic beginning on March 16, 2020. Petitioner asserts that its submission raises material questions of fact as to whether the Division had sufficient staff to effectuate the mailings in question and whether the Division followed the standard procedure outlined in the affidavits of Deena Picard and Susan Sacoccio. We disagree. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary determination (*Whelan v GTE Sylvania*, 182 AD2d at 449 quoting *Zuckerman v City of New York*, 49 NY2d at 562). The affirmation by petitioner's representative contains nothing more than mere speculation and unsubstantiated assertions as to the Division's in-office staffing and the mailing procedures followed by Division employees and is inadequate to establish the existence of a factual issue requiring a hearing.

Furthermore, the text of the message from the Commissioner that is attached to the representative's affirmation does not raise a material issue of fact either. The message indicates that the Division would reduce its on-site staffing to critical functions beginning on March 23, 2020. The mailing in this matter was effectuated on March 20, 2020, prior to the date of alleged reduced office staffing. Although petitioner asserts that the Division began reducing its on-site staff due to COVID-19 on March 16, 2020, petitioner did not substantiate that allegation or present any facts to demonstrate that, even if that were the case, there may have been insufficient staff on-site to mail the subject notice on March 20, 2020. Furthermore, the copy of the "message from the Commissioner" submitted by petitioner does not include the list of critical functions referred to therein. Given the foregoing, we disagree with petitioner's contention that the message from the Commissioner somehow casts doubt on whether the Division's affiants accurately recounted the Division's standard mailing procedure and whether those procedures were followed in this instance. We note again that in addition to the affidavits provided by the Division employees, the CMR includes the initials of the USPS employee who received the mailing and a postmark of March 20, 2020. Given the foregoing, we find that the facts with regard to the mailing of the subject notice are not controverted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hillary Hulteen is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Hillary Hulteen is denied; and
4. The conciliation order dismissing petitioner's request, dated September 4, 2020 is sustained.

DATED: Albany, New York
September 29, 2022

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner