

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**KEVIN W. TAFLIN** : DETERMINATION  
 : DTA NO. 826996  
for Redetermination of Deficiencies or for Refund of New :  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Years 2005 through 2009 and for Revision :  
of Determinations or for Refund of Sales and Use Taxes :  
under Articles 28 and 29 of the Tax Law for the Period :  
March 1, 2007 through November 30, 2010. :

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Petitioner, Kevin W. Taflin, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2005 through 2009 and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2007 through November 30, 2010.

On November 6, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the required statutory notices were not attached (20 NYCRR 3000.3[b][8]). The notices were subsequently supplied and the Notice of Intent to Dismiss Petition was rescinded by letter, dated January 28, 2016.

On February 26, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the petition did not appear to be timely with respect to 26 of the statutory notices being petitioned. By letter, dated May 6, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge, modified the Notice of Intent to Dismiss to comport with the Division of Taxation's inability to provide proof of mailing

for five of the petitioned assessments: L-035448281, L-035448283, L-035448284, L-035448285 and L-027114305. Judge Ranalli rescinded the Notice of Intent to Dismiss with regard to the notices listed above, and informed petitioner that those notices would proceed on the merits of the case under DTA number 827611. The remaining 21 notices will be addressed in this determination.

On May 2, 2016, the Division of Taxation, by Amanda Hiller, Esq. (James Connolly, Esq., of counsel) submitted an affidavit and annexed exhibits in support of dismissal. Petitioner, appearing by Richard J. Girasole, CPA, did not respond to the Notice of Intent to Dismiss. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 12, 2016, pursuant to an extension granted by the Division of Tax Appeals. After due consideration of the affidavit and exhibits submitted and all the pleadings and proceedings had herein, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of numerous notices of determination and notices of deficiency.

***FINDINGS OF FACT***

1. On May 29, 2015, petitioner, Kevin W. Taflin, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the following notices of determination, notices of estimated determination and notices of deficiency: L-036626233-5, L-036626232-6, L-036626231-7, L-036626230-8, L-036626229-8, L-036626228-9, L-035448285-9, L-035448284-1, L-035448283-2, L-035448281-4, L-032359580-3, L-032359579-3, L-032359578-4, L-

032359577-5, L-032359576-6, L-032359575-7, L-032359574-8, L-031489880-5, L-031489879-5, L-031489878-6, L-031489877-7, L-031489876-8, L-031489875-9, L-031489874-1, L-031489873-2 and L-027114305-3.<sup>1</sup>

2. The 21 notices in issue were issued on various dates but were all mailed to petitioner at his Staten Island, New York, address, established by reference to petitioner's recently filed tax returns for 2006 and 2009.

3. On February 26, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of notices of determination and notices of deficiency issued to petitioner more than 90 days prior to the petition being filed in this matter.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of five of the notices in issue, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated April 28, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 23, 2009; (iii) an affidavit, dated April 29, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) copies of the two July 23, 2009 notices of deficiency with the associated mailing cover sheets and copies of the three July 23, 2009 notices of determination with the associated mailing cover sheets; and (v) a copy of

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<sup>1</sup>The petition with respect to assessment numbers L-035448281, L-035448283, L-035448284, L-035448285 and L-027114305 will proceed on the merits under a separate file number, 827611, because the Division of Taxation could not produce proof of mailing for them.

petitioner's 2006 New York personal income tax return, dated November 1, 2007, which was the last return filed prior to the issuance of the five notices issued on July 23, 2009.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and 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. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "7/23/09." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. All notices 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 P.O. Address.”

7. The first CMR in the present matter consists of 91 pages and lists 995 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a USPS postmark dated July 23, 2009 to each page of the CMR, wrote his or her initials on each page thereof, and circled the number “995” on page 91 next to the heading “Total Pieces and Amounts.”

8. Page 15 of the CMR lists 2 notices of deficiency, assigned certified control number 7104 1002 9730 1495 2964 and assessment number L-032359579, and 7104 1002 9730 1495 2971 and assessment number L-032359580, respectively. In addition, the same page listed 3 notices of determination, assigned certified control numbers 7104 1002 9730 1495 2933, 7104 1002 9730 1495 2940 and 7104 1002 9730 1495 2957 and assessment numbers L-032359574, L-032359575 and L-032359576, respectively. All five notices were mailed to petitioner at the Staten Island, New York, address listed on his 2006 personal income tax return. The corresponding mailing cover sheets bear the same certified control numbers and petitioner’s name and address as noted.

9. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves 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 listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained 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. Here, as noted, the USPS employee affixed a postmark dated July 23, 2009 on and initialed each page of the CMR. The Center 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. Here, the USPS employee complied with this request by circling the number "995" on the last page next to the heading "Total Pieces and Amounts."

10. Based upon his review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the CMR, and his personal knowledge of the procedures of the mail room, Mr. Peltier stated that on July 23, 2009, an employee of the mail room delivered five pieces of certified mail addressed to petitioner, in Staten Island, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier attested that the procedures described in his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on July 23, 2009.

11. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove

mailing of eight of the notices in issue on January 22, 2009, the Division submitted the following: (i) an affidavit, dated April 28, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked January 22, 2009; (iii) an affidavit, dated April 29, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) copies of the four January 22, 2009 notices of deficiency with associated mailing cover sheets, copies of the three January 22, 2009 notices of determination with associated mailing cover sheets and a copy of the Notice of Estimated Determination with associated mailing cover sheet; and (v) a copy of petitioner's 2006 New York personal income tax return, dated November 1, 2007, which was the last return filed prior to the issuance of the eight notices issued on January 22, 2009.

12. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Mary Ellen Nagengast in Finding of Fact 5 and 6, are incorporated by reference as if fully set forth here. The second CMR in the present matter consists of 8 pages and lists 87 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a USPS postmark dated January 22, 2009 to each page of the CMR, wrote his or her initials on each page thereof, and circled the number "87" on page 8 next to the heading "Total Pieces and Amounts."

13. Page two of the second CMR lists four notices of deficiency, three notices of determination and one notice of estimated determination assigned specific identifying data. The

four notices of deficiency were identified by certified control number 7104 1002 9730 1125 6591 and assessment number L-031489877, certified control number 7104 1002 9730 1125 6607 and assessment number L-031489878, certified control number 7104 1002 9730 1125 6614 and assessment number L-031489879, and certified control number 7104 1002 9730 1125 6621 and assessment number L-031489880, respectively. The same page listed three notices of determination, assigned certified control number 7104 1002 9730 1125 6560 and assessment number L-031489874, certified control number 7104 1002 9730 1125 6577 and assessment number L-031489875, certified control number 7104 1002 9730 1125 6584 and assessment number L-031489876, respectively. In addition, the same page of the CMR listed an eighth notice, a notice of estimated determination, certified control number 7104 1002 9730 1125 6553 and assessment number L-031489873. All eight notices were mailed to petitioner at the Staten Island, New York, address, the same address listed on his 2006 personal income tax return, the last return petitioner filed before issuance of these notices. The corresponding mailing cover sheets bears the same certified control numbers and petitioner's name and address as noted.

14. The Division's general operations and procedures in its mail room, as set out in the affidavit of Bruce Peltier in Findings of Fact 9 and 10, are incorporated by reference as if fully set forth here. With respect to the second CMR, Mr. Peltier attested to the fact that the USPS employee affixed a postmark dated January 22, 2009 on and initialed each page of the CMR and, in accordance with the Division's request, circled the number "87" on the last page next to the heading "Total Pieces and Amounts."

Based upon his review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the second CMR, and his personal knowledge of the procedures of the mail room, Mr.



Peltier stated that on January 22, 2009, an employee of the mail room delivered eight pieces of certified mail addressed to petitioner in Staten Island, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier attested that the procedures described in his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on January 22, 2009.

15. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of two of the notices in issue, the Division submitted the following: (i) an affidavit, dated April 28, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a third "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 30, 2009; (iii) an affidavit, dated April 29, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) copies of the two July 30, 2009 notices of deficiency with the associated mailing cover sheets; and (v) a copy of petitioner's 2006 New York personal income tax return, dated November 1, 2007, which was the last return filed prior to the issuance of the two notices issued on July 30, 2009.

16. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Mary Ellen Nagengast in Findings of Fact 5 and 6, are incorporated by reference as if fully set forth here. The third CMR in the present matter consists of 19 pages and lists 202 certified control numbers along with corresponding assessment numbers, names and addresses. Three of the preprinted assessment numbers were pulled from the CMR prior to

mailing, leaving only 199 certified mailings accounted for on the third CMR. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a USPS postmark dated July 30, 2009 to each page of the CMR, wrote his or her initials on each page thereof, and wrote the number “199” on page 19 to the right of the heading “Total Pieces and Amounts.”

17. Page three of the third CMR lists two notices of deficiency assigned specific identifying data. The two notices of deficiency were identified by certified control number 7104 1002 9730 1497 5819 and assessment number L-032359577, and certified control number 7104 1002 9730 1497 5826 and assessment number L-032359578, respectively. The two notices were mailed to petitioner at the Staten Island, New York, address, the same address listed on his 2006 personal income tax return, the last return petitioner filed before the notices were mailed. The corresponding mailing cover sheets bear the same certified control numbers and petitioner’s name and address as noted.

18. The Division’s general operations and procedures in its mail room, as set out in the affidavit of Bruce Peltier in Findings of Fact 9 and 10, are incorporated by reference as if fully set forth here. With respect to the third CMR, Mr. Peltier attested to the fact that the USPS employee affixed a postmark dated July 30, 2009 on and initialed each page of the CMR and, in accordance with the Division’s request, wrote the number “199” on the last page to the right of the heading “Total Pieces and Amounts.”

Based upon his review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the third CMR, and his personal knowledge of the procedures of the mail room, Mr.

Peltier stated that on July 30, 2009, an employee of the mail room delivered two pieces of certified mail addressed to petitioner in Staten Island, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier attested that the procedures described in his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on July 30, 2009.

19. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of six of the notices in issue, the Division submitted the following: (i) an affidavit, dated April 28, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a fourth "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 16, 2011; (iii) an affidavit, dated April 29, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) copies of the five September 16, 2011 notices of deficiency and the Notice of Determination with the associated mailing cover sheets; and (v) a copy of petitioner's 2009 New York personal income tax return, dated November 23, 2010, which was the last return filed prior to the issuance of the six notices issued on September 16, 2011.

20. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Mary Ellen Nagengast in Findings of Fact 5 and 6, are incorporated by reference as if fully set forth here. The fourth CMR in the present matter consists of 32 pages and lists 351 certified control numbers along with corresponding assessment numbers, names and

addresses. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a USPS postmark dated September 16, 2011 to each page of the CMR, wrote his or her initials on each page thereof, and circled the number “351” on page 32 to the right of the heading “Total Pieces and Amounts.”

21. Pages eight and nine of the fourth CMR lists 5 notices of deficiency assigned specific identifying data. The 5 notices of deficiency were identified by certified control number 7104 1002 9730 0810 3761 and assessment number L-036626228, certified control number 7104 1002 9730 0810 3778 and assessment number L-036626229, certified control number 7104 1002 9730 0810 3785 and assessment number L-036626230, certified control number 7104 1002 9730 0810 3792 and assessment number L-036626231, and certified control number 7104 1002 9730 0810 3808 and assessment number L-036626232, respectively. The Notice of Determination was identified by certified control number 7104 1002 9730 0810 3815 and assessment number L-036626233. The six notices were mailed to petitioner at the Staten Island, New York, address, the same address listed on his 2009 personal income tax return, dated November 23, 2010, the last return petitioner filed before the notices were mailed. The corresponding mailing cover sheets bear the same certified control numbers and petitioner’s name and address as noted.

22. The Division’s general operations and procedures in its mail room, as set out in the affidavit of Bruce Peltier in Findings of Fact 9 and 10, are incorporated by reference as if fully set forth here. With respect to the fourth CMR, Mr. Peltier attested to the fact that the USPS employee affixed a postmark dated September 16, 2011 on and initialed each page of the CMR and, in accordance with the Division’s request, circled the number “351” on the last page to the

right of the heading “Total Pieces and Amounts.”

Based upon his review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the fourth CMR, and his personal knowledge of the procedures of the mail room, Mr. Peltier stated that on September 16, 2011, an employee of the mail room delivered six pieces of certified mail addressed to petitioner at his Staten Island, New York, address, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier attested that the procedures described in his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on September 16, 2011.

#### ***CONCLUSIONS OF LAW***

A. A taxpayer may protest a notice of determination or notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law §§ 689[b]; 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). Absent a timely protest, a notice of determination or deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive

merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on January 22, 2009, July 23, 2009, July 30, 2009 and September 16, 2011. The CMRs were properly completed and, therefore, constitute highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMRs and thereby establish that the general mailing procedure was followed for each of the mailings in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheets and CMRs conforms with the address listed on petitioner's personal income tax returns filed for the years 2006 and 2009, the last returns filed prior to issuance of the notices, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on January 22, 2009, July 23, 2009, July 30, 2009 and September 16,

2011 and the statutory 90-day time limit to file either a Request for 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]).

D. Petitioner's protest was not filed until May 29, 2015, years after the subject notices were issued. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

E. This determination, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessments. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion "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. . . ."

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notices were issued. Moreover, petitioner has failed to respond to the Notice of Intent to Dismiss Petition or to challenge the Division's proof of mailing of the notices with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002), and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition.

G. The petition of Kevin W. Taflin is dismissed.

DATED: Albany, New York  
August 11, 2016

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/s/ Daniel J. Ranalli  
SUPERVISING ADMINISTRATIVE LAW JUDGE